No. 9277

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Appellant,

vs.

JAMES RALPH HUNT,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon.

PARKER PRINTING COMPANY 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD:

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for Appellant.

GEORGE L. RAUCH,
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Portland, Oregon,
for Appellee.

In the District Court of the United States for the District of Oregon

November Term, 1937

Be It Remembered, That on the 4th day of December, 1937, there was duly filed in the District Court of the United States for the District of Oregon, a Second Amended Complaint in words and figures as follows, to wit: [1*]

In the District Court of the United States for the District of Oregon

No. L 12711

JAMES RALPH HUNT,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation, and UNION SERVICE STATIONS, INC., a corporation.

Defendants.

SECOND AMENDED COMPLAINT

Plaintiff complains of Defendants and alleges:

I.

That Defendants are corporations, organized and existing under and by virtue of the laws of the State of California, and at all times herein mentioned were doing business in the State of Oregon at 3230 N. E. Union Avenue in the City of Portland therein.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

II.

That at all times herein mentioned, particularly between on or about the 1st day of June, 1934, and on or about the 30th day of November, 1934, Defendants were engaged at said location in the operation and control of a workshop, yard and service station wherein they maintained, employed and operated machinery, including machinery moved and operated by power other than hand power, and were using electricity and dangerous appliances and exercising manual labor for gain, for the purpose of and incidental to the purpose of servicing, repairing and adapting for use motor cars and trucks, all of which work involved great risk and danger to their employees, including Plaintiff, and over all of which said property and equipment Defendants at all times herein mentioned had charge and control and the right of access.

III.

That on or about the 12th day of June, 1934, Plaintiff, under the directions of Defendants and while employed by them, was ordered and caused to attempt to change and dismount an [2] automobile tire from a wheel rim with tire irons and levers carelessly, recklessly and negligently furnished Plaintiff by Defendants, in that the latter tools were so short, narrow, and inefficient that Plaintiff, while in the exercise of due care on his part, in endeavoring to use the same as hereinbefore described, was caused to strain, sprain and injure his back, and the tissues, tendons, muscles, bones and nerves

thereof, and was thereby rendered sick and debilitated and made necessarily to secure medical service and assistance and to have his back enclosed in a special medical belt or brace, which medical service and equipment Defendants furnished and supplied, and to be confined at his home and remain away from his work for a period of three weeks, all of which facts at all times herein mentioned were and now are well known to Defendants, and at no time herein mentioned did Defendants furnish Plaintiff in or about their said workshop with longer and wider tire irons or levers with which to change or dismount automobile tires, although such last said tools are simple, and it was and is practicable to secure such longer and wider tire irons, and many of the latter type of said tire irons are in common use in and about the community in which Defendants at the times herein complained of were conducting said workshop.

IV.

That on or about the 14th day of July, 1934, Defendants, while so treating him for said injuries, directed Plaintiff to return to work for Defendants at said location, and that on or about the 5th day of October, 1934, while Plaintiff was so employed as hereinbefore alleged, Defendants required Plaintiff to go a considerable distance from said workshop to change an automobile tire for a customer of Defendants, and Defendants willfully, wantonly, wrongfully and negligently failed to provide and furnish

Plaintiff with a safe, or any device, tool, or equipment for raising an automobile while in the process of changing a tire thereof, and particularly a jack so constructed that the operator thereof, while so changing automobile tires, could be and remain away from [3] underneath the automobile, and any other place exposed to danger, while it was being raised in said process, and failed to use any care or precaution for the protection of life and limb while he was so engaged, and particularly failed to provide Plaintiff with an able-bodied assistant, although there were at all times herein complained of, several forms of safe devices, tools and equipment in use in the City of Portland which were practicable to be used and which when used provided safe working conditions for and care and protection to the life and limb of persons engaged in work, as was Plaintiff as herein complained of, including safe automobile jacks as above described, and able-bodied assistants, and that such safe devices, tools, equipment, automobile jacks and able-bodied assistants in no way would have lessened the efficiency of any tool or apparatus employed by Defendants in the operation of said workshop and service station, and that because of Defendants' failure to furnish such safe devices, tools and equipment, Plaintiff, while so in obedience to the orders of Defendants, was required and compelled to use a device or automobile jack alone and without assistance and to crawl under the automobile of said customer of Defendants and remain thereunder while raising the

same as a part of the process of changing said tire, and that operation of said automobile jack was particularly dangerous to said Plaintiff.

V.

That as a result of Defendants' said action as herein complained of, the said automobile of Defendants' customer was caused to slip from the said jack so used by said Plaintiff, and to fall upon said Plaintiff and strike his body in the region of his back and legs and hips, particularly the part of his body which had been injured as heretofore mentioned, and to bruise, strain and sprain the muscles, tissues, tendons and ligaments of his back, hips and shoulders and to break and crush the bones of his back, and to cause him to suffer great pain and shock and to become unconscious and immediately following said blow to become paralyzed and confined to his bed for about one week, whereupon [4] Defendants assumed and proceeded to supply Plaintiff with medical treatment through doctors employed by Defendants, and that on or about the 15th day of October, 1934, said doctors advised and recommended a major operation for Plaintiff because of his injuries, and when Defendants finally authorized said operation, Plaintiff's injuries and the pain and anguish thereof had become greatly increased, and said second injury had greatly aggravated and increased the injurious effect upon Plaintiff of the said first injury, and had caused the nerves, tendons, muscles, and tissues in and about

Plaintiff's back to become irritated, inflamed, and sore and caused lime to be deposited in and about the region of said injuries and to increase the area and extent of Plaintiff's injuries, which are permanent as herein set forth, and it was necessary to fuse or fasten together several of Plaintiff's vertebrae and his pelvis into one large bone, and to destroy the mobility of the parts thereof, rendering Plaintiff permanently crippled, handicapped and incapacitated, with his back permanently stiffened and the movements of his body greatly lessened and impaired and its usefulness permanently restricted and largely destroyed, all of which impairment and restricted condition are likely to increase, and that from the time of said operation until on or about the 21st day of April, 1935, Plaintiff was confined to a hospital, and from on or about April 21, 1935, until on or about the 1st day of July, 1935, Plaintiff was confined to his home with his back in a brace during all of which time, from the date of said second injury until the last said date, Plaintiff was under constant care of Defendants through their physicians and continued to be for many months thereafter in order to become cured as far as possible of said injuries, and suffered great pain and anguish, mental and physical, all of which conditions are permanent and are likely to increase.

VI.

That prior to the injuries herein complained of, Plaintiff was a strong, active, athletic and capable young man, able to work hard at his business and

advancing therein, and engaged in athletic contests, but as a result of said injuries he can no longer endure [5] hard physical work and is not efficient therein and is no longer able to enjoy and compete in athletics, and has had to seek employment requiring less physical activity, and must spend large sums of money to become rehabilitated because of his said permanent injury and incapacity.

VII.

That on or about the 1st day of July, 1932, Defendant Union Service Stations, Inc., rejected the Workman's Compensation Law of the State of Oregon, and that said rejection became effective upon last said date, and has continued to be effective at all times since, and that on or about the 1st day of July, 1934, Defendant Union Oil Company of California rejected the Workman's Compensation Law of the State of Oregon, and that its said rejection became effective upon last said date, and has continued to be effective at all times since.

VIII.

That as a direct result of said negligent, wrongful, wanton and willful conduct, acts and omissions of defendants as hereinbefore alleged, Plaintiff has been damaged and injured in the sum of $35,000.00.

IX.

That by reason of said negligent, wrongful, wanton and willful conduct on the part of Defendants, and as a warning to other wrongdoers, Defendants

should be required to pay Plaintiff exemplary or punitive damages in the sum of $10,000.00.

Wherefore, Plaintiff demands judgment against defendants and each of them in the sum of $45,000.00, together with his costs and disbursements incurred herein.

GEO. L. RAUCH,
Attorney for Plaintiff.

[Endorsed]: Filed December 4, 1937. [6]

And afterwards, to wit, on the 3rd day of October, 1938, there was duly filed in said Court, an Answer to Second Amended Complaint, in words and figures as follows, to wit: [7]

[Title of District Court and Cause.]

AMENDED ANSWER TO SECOND AMENDED COMPLAINT

Comes now the defendants and for answer to plaintiff's second amended complaint, admit, deny and allege as follows:

I.

Deny Paragraphs I, II, III, IV, V, VI, and VIII of the complaint and the whole thereof, except insofar as the same agrees with and conforms to the allegations and statements set forth in the affirmative defenses hereinafter set up by defendants.

II.

Admit Paragraph VII of the complaint.

For a first, further and separate answer and defense, defendants allege:

I.

That defendant, Union Oil Company of California is a corporation and at all times mentioned in the complaint and in this answer was doing business in the State of Oregon;

II.

That the Union Service Stations, Inc., formerly a corporation doing business in this State, ceased to do business in this State as a corporation on July 1, 1934, and on that date through dissolution ceased to exist as a corporation. [8]

III.

That the plaintiff, James Ralph Hunt, was in the employ of the Union Service Stations, Inc., during the month of June, 1934, as a filling station attendant at a filling station located at 3230 N. E. Union Avenue in the City of Portland, Oregon, and on about June 12th, 1934, plaintiff complained of having strained his back in connection with his work as a filling station attendant at which time, plaintiff was sent to and received medical attention from Dr. R. B. Dillehunt. On July 1, 1934, Plaintiff entered the employ of the Union Oil Company. Thereafter and during the month of November, 1934, the plaintiff, while working as a filling station attendant

at the aforesaid filling station, again complained that his back was still bothering him, at which time he went back to Dr. R. B. Dillehunt for further examination, and Dr. Dillehunt found that the sprain complained of on June 12, 1934, was a continuing condition and thereafter performed an operation on the plaintiff for a chronic lumbo-sacro instability, and that said operation was a very successful one; that in connection with said operation for a chronic lumbo-sacro instability, the plaintiff was in the hospital and lost several months time from his employment; that compensation payments were made to the plaintiff on behalf of the Union Service Stations, Inc., for all the time that plaintiff lost from his work; that the plaintiff accepted these compensation payments as payment in full for any and all claims that he might otherwise have had against the Union Oil Company and the Union Service Stations, Inc., and made settlement in full and released the said Union Oil Company and said Union Service Stations, Inc., and fully compromised his claim with said defendants for the same matter which he is now claiming for in his complaint herein. That there was paid to the plaintiff herein the sum of $235.30 as compensation as payment in full for his said claim and there was paid on his account the sum of $414.50 to Dr. R. B. Dillehunt and the sum of $163.35 to the Emanuel Hospital and the sum of $7.50 to Dr. E. W. Simmons. Said plaintiff [9] accepted these compensation payments in full settlement for the claim which he now sets forth in his complaint.

IV.

That plaintiff at the time of his alleged back trouble as set forth in his complaint and prior thereto, was suffering from a congenitally weak back, known as a congenital*ly* anomaly, and plaintiff's back was vulnerable to stress and strain; and to overcome this congenital condition and to strengthen plaintiff's back, Dr. Dillehunt performed an operation on plaintiff's back and the aforesaid instability has been cured and plaintiff's back was benefited by said operation, and plaintiff has been able to carry on his usual work ever since he recovered from the operation.

For a second further and separate answer and defense, defendants allege:

I.

Plaintiff was familiar with all the circumstances and conditions surrounding his work at said filling station and if there was any risk or danger in connection with the using of the tools referred to in changing automobile tires, such risk and danger was assumed by the plaintiff.

For a third further and separate answer and defense, defendants allege:

I.

That plaintiff claims he injured his back while changing an automobile tire. If plaintiff did strain his back as alleged, it was through no fault or carelessness on the part of these defendants, but was the

result of plaintiff's own carelessness and negligence. Plaintiff, himself, was in the best position to know his own strength and these defendants would not be liable for over-exertion, if any, on the part of the plaintiff. [10]

II.

That the defendant, Union Oil Company of California, was under the State Workmen's Compensation Act during the month of June, 1934, at which time plaintiff claims to have strained his back and no action can be maintained against this defendant for said alleged injury.

III.

That the plaintiff was not employed in any capacity by the defendant, Union Service Stations, Inc., subsequent to July 1, 1934, and performed no services for said defendant subsequent to that time.

Wherefore, defendants having answered plaintiff's second amended complaint, pray that the same be dismissed and that they have judgment against plaintiff for their costs and disbursements herein.

(Sgd.) JAMES ARTHUR POWERS,
Attorney for Defendants.

[Endorsed]: Filed October 3, 1938. [11]

And afterwards, to wit, on Wednesday, the 14th day of December, 1938, the same being the 32nd Judicial day of the Regular November, 1938, term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[Title of District Court and Cause.]

ORDER FORMULATING ISSUES

Admissions

The above entitled cause coming on to be heard on the 12th day of December, 1938, on the Order of the Court for a pre-trial, plaintiff appearing in person and by his attorney, Geo. L. Rauch, Defendant appearing by its Service Station Supervisor, Mr. Winn, and James Arthur Powers, its attorney; the cause proceeded upon a pre-trial, certain exhibits were introduced and certain facts were admitted and the Court being fully advised in the premises:

Now, Therefore, in accordance with the rules of Civil Procedure, the Court finds the following facts admitted:

1. That the Union Oil Company of California is a corporation organized and existing under and by virtue of the laws of the State of California and at all times mentioned in the Complaint and Answer herein was doing business in the State of Oregon.

2. That on or about the 12th day of June, 1934, plaintiff was employed by the Union Service Stations, Inc.

3. That on or about the 14th day of July, 1934, after being absent because of a strained and debilitated condition of his back, returned to work at the filling station located at 3230 N. E. Union Avenue, in the City of Portland.

4. That on or about the 28th day of February, 1935, [12] plaintiff entered the hospital and was discharged April 20, 1935, and that while so in the hospital on the 1st day of March, 1935, an operation was performed upon him, known as a lumbosacral fusion operation, and that following the operation his back was placed in a brace.

5. That on or about the 1st day of July, 1932, Defendant Union Service Stations, Inc., rejected the Workmen's Compensation law for the State of Oregon and which rejection continued to be in effect through the month of June, 1934, said rejection never having been cancelled; and on July 1, 1934, the defendant Union Oil Company of California rejected said Workmen's Compensation law of Oregon and its rejection of the same became effective on said date and has continued to be effective at all times since.

6. That the plaintiff was in the employ of the Union Service Stations, Inc., during the month of June, 1934, as a filling station attendant at its filling station located at 3230 N. E. Union Avenue in the City of Portland, Oregon.

7. That on or about the 12th day of June, 1934, plaintiff complained of having strained his back in connection with his work as a filling station atten-

dant at which time defendant sent plaintiff to Dr. R. B. Dillehunt and received medical attention and at that time it was found that plaintiff had a strained back affecting the tissues, tendons, muscles, bones and nerves thereof. Medical services were necessary and plaintiff's back was enclosed in a medical brace or belt furnished through said doctor. That on the first day of July, 1934, plaintiff was in the employ of the Union Oil Company.

8. That defendant, Union Oil Company of California was under the Workmen's Compensation law of Oregon during the month of June, 1934.

9. That defendants knew on or about June 12, 1934, that plaintiff was suffering from a strained back and that thereafter [13] and when he returned to work at the said filling station located at 3230 N. E. Union Avenue, plaintiff had to wear a special medical belt or brace which had been furnished and supplied to plaintiff by Dr. Dillehunt.

10. That one of the defendants after the date on which the said second injury is alleged to have occurred supplied plaintiff with medical treatment including a lumbosacral operation.

Issues

The following matters alleged in the plaintiff's complaint and defendants' answer and the materiality and competency thereof are in dispute, namely:

1. Whether or not the defendant Union Service Stations, Inc., was doing business in the State of Oregon subsequent to July 1, 1934.

2. Whether or not defendants, or either of them, were engaged between on or about the 1st day of June, 1934, and on or about the 30th day of November, 1934, at 3230 N. E. Union Avenue, sometimes known as the corner of Union and Fargo Streets in the City of Portland, Oregon, in the operation of an activity governed and controlled by the Employers Liability Act, known as section 49-1701 to Section 49-1706 inclusive, of the Oregon Code 1930.

3. Whether or not between the dates last named and the location mentioned in the preceding paragraph, defendants or either of them were operating any machinery, including a machine moved and operated by power other than hand power, with electricity or any dangerous appliances or substance exercising manual labor for gain, or any work involving risk and danger to their employees or the employees of either of them including plaintiff, or generally having charge of or responsible for any work involv- [14] ing a risk or danger to their employees including plaintiff or employees of either of them including plaintiff, and if so, whether or not such defendants or either of them used every device, care, and precaution which is practical to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or devices and without regard to the additional costs of suitable materials or safety appliances and devices.

4. Whether or not on or about the 12th day of June, 1934, plaintiff under the directions and while

employed by the defendants or either of them, was ordered and caused to dismount an automobile tire from a wheel rim with tire irons and levers carelessly and recklessly furnished plaintiff by defendants or either of them which were short, narrow and inefficient; and whether or not while endeavoring to use the same plaintiff was caused to injure his back making necessary medical service and had his back enclosed in a special medical belt furnished and supplied by the defendants or either of them and to be confined at his home for a considerable period; and whether or not it is practicable to secure longer and wider tire irons and whether or not any longer and wider tire irons were in common use in the community in which defendants were conducting the activity hereinbefore described and conducted at said location hereinbefore mentioned.

5. Whether or not while plaintiff was being treated at the direction of defendants or either of them, he was directed by them or either of them to return to the said location and whether or not on or about the 5th day of October, 1934, plaintiff while so employed was required by defendants or either of them, to leave said place of business and change an automobile tire for a customer and whether or not while doing so the said [15] automobile fell on plaintiff injuring his back.

6. Whether or not defendants or either of them wantonly or negligently failed to provide plaintiff with a safe device or tool for raising the automobile while changing a tire thereof, particularly a jack so

constructed that an operator, including plaintiff while so changing such a tire, could be away from and unexposed to danger while such an automobile was being raised; and whether or not defendants or either of them failed to use care, or precaution for the protection of plaintiff while so engaged including the failure to provide plaintiff with an able-bodied assistant; whether or not at the times herein complained of, devices and tools were in use in the City of Portland which were practicable to be used and which when used afforded safe working conditions for the protection of persons such as plaintiff, engaged in such work, including safe automobile jacks and able-bodied assistants.

7. Whether or not such safe devices and tools and able-bodied assistance would have lessened the efficiency of such tool or apparatus when employed by defendants or either of them in the operation of its said activity at said location; and whether or not under such conditions and as a result thereof, plaintiff was required by defendants or either of them to use an automobile jack alone without assistance which caused him to be put in a place of danger while raising such an automobile with particular danger to plaintiff.

7a. Whether the tools furnished were safe and if not whether such tools and able-bodied assistance would have lessened the efficiency of such tool or apparatus when employed by defendants or either of them in the operation of its said activity at said location; and whether or not defendants, or either

of them, were negligent in furnishing plaintiff with an automobile jack to be used by him alone and without an able-bodied assistant. [16]

8. Whether or not defendants or either of them required plaintiff to use such an inefficient and dangerous jack that said automobile was caused to slip from said jack and to fall upon plaintiff and to strike him in the region of his body and legs, including the part of his body injured by reason of said inefficient tire irons on or about the 12th day of June, 1934, and to bruise, sprain and injure, break and crush his back, hips and the bones thereof, and to cause him great pain and shock and to become unconscious following said blow and to become paralyzed and to be confined to his bed for about one week; and whether or not said second injury aggravated and increased the injurious effect upon plaintiff of said first injury; and whether or not such second injury, including aggravation of said first injury, caused the nerves, tissues, bones and muscles of plaintiff's back to become irritated, sore and lime to be deposited about the region of said injury; and whether or not such injuries as hereinbefore set forth are permanent and whether or not as a result of said alleged second injury and alleged aggravation it was necessary to fuse together some of plaintiff's vertebrae and his pelvis and to destroy the mobility of plaintiff's back and limbs and caused him to become permanently crippled and handicapped and the usefulness of his body impaired.

9. Whether or not after a period of confinement in the hospital terminating the 20th day of April, 1935, until on or about the first day of July, 1935, plaintiff was confined to his home with his back in a brace; and whether or not from the date of said second injury until on or about last said date, plaintiff was under the care of physician employed by defendants or either of them.

10. Whether or not plaintiff suffered as a result of said second injury and said aggravation of the first, pain and anguish mental and physical and whether or not such conditions are [17] permanent and likely to increase.

11. Whether or not prior to the said injuries particularly said second injury and said aggravation of the first, plaintiff was a strong, athletic young man, able to work hard at all forms of his occupation and engage in athletics, and whether or not as a result of said alleged second injuries including said aggravation if any of said first injury he now can no longer endure hard physical work and is not efficient therein, and is no longer able to enjoy and compete in athletics.

12. Whether or not he has to seek employment requiring less physical activity particularly for his back and whether or not he must spend large sums of money in order to become rehabilitated because of the permanency of his injury and its resulting incapacity.

13. Whether or not plaintiff because of the said negligent acts of defendants or either of them has

been damaged or injured in the sum of $35,000.00.

14. Whether or not the acts of defendant or either of them herein complained of by the plaintiff were wanton or wilful and if so whether defendants or either of them should be required to pay plaintiff as exemplary damages the sum of $10,000.00.

15. Whether or not during the month of November, 1934, plaintiff while working as a filling station attendant at the aforesaid location where defendant Union Oil Company was conducting a filling station, plaintiff again complained that his back was still bothering him and whether or not he went back to Dr. Dillehunt for further examination and whether or not said Dr. Dillehunt found that the said sprain complained of on June 12, 1934, was a continuing condition and thereafter performed an operation on plaintiff for a chronic instability, and whether or not such operation was successful and whether or not plaintiff was in the hospital in connection with said operation for chronic [19] lumbrosacral instability from Feb. 28, 1935, to April 20, 1935, and whether or not plaintiff while in the hospital and later while recovering lost several months' time from his employment.

16. Whether or not compensation payments were made to plaintiff on behalf of Union Service Stations, Inc., for all the time plaintiff lost from his work and whether or not plaintiff accepted such compensation payments as payment in full for any and all claims that he might otherwise have against

Union Oil Company of California and Union Service Stations, Inc., and whether or not he made settlements in full and released Union Service Stations, Inc., and Union Oil Company of California and fully compromised his claim with said defendants for the same matter and alleged injuries which he is now claiming for in his complaint herein and whether or not there was paid to plaintiff the sum of $235.30 as compensation as payment in full for his said claim and there was paid on his account the sum of $414.50 to Dr. Dillehunt and $163.35 to Emanuel Hospital and $7.50 to Dr. E. W. Simmons

17. Whether or not plaintiff at the time of his said back trouble as alleged in his complaint and prior thereto, was suffering from a congenitally weak back known as a congenital anomaly and whether or not plaintiff's back was vulnerable to stress and strain, and whether or not to overcome said condition and to strengthen plaintiff's back Dr. Dillehunt performed an operation on plaintiff's back and whether or not the aforesaid instability has been cured and plaintiff was benefited by said operation and whether or not plaintiff has been able to carry on his usual work since he recovered from said operation.

18. Whether or not plaintiff was familiar with the circumstances and conditions surrounding his work at said filling station and whether there was any risk and danger in using the tools referred to in changing automobile tires and if so whether [18] plaintiff assumed the same.

19. Whether or not if plaintiff did injure and strain his back as alleged in his complaint, it was through and as a result of his own carelessness and negligence.

20. Whether or not plaintiff did strain and injure his back as alleged in his complaint and if so whether it was through over exertion on his own part and whether plaintiff can maintain an action against the Union Oil Company because during the month of June, 1934, it was under the Oregon Workmen's Compensation Act.

21. Whether or not plaintiff was at any time employed in any capacity or performed services for defendant Union Service Stations, Inc., subsequent to July 1, 1934.

That this order be filed and recorded, and substituted for the pre-trial order also signed on this date.

Dated this 14th day of December, 1938.

CLAUDE McCOLLOCH.

[Endorsed]: Filed December 14, 1938. [20]

And afterwards, to wit, on the 22nd day of December, 1938, there was duly filed in said Court, a Verdict, in words and figures as follows, to wit: [21]

[Title of District Court and Cause.]

VERDICT

We, the jury, duly empaneled to try the above entitled cause, do find our verdict for the Plaintiff and against the Defendant and assess the Plaintiff's damages in the sum of $6,000.

MAX KLIGEL,

Foreman.

[Endorsed]: Filed December 22, 1938. [22]

And afterwards, to wit, on Thursday, the 22nd day of December, 1938, the same being the 39th Judicial day of the Regular November, 1938, term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [23]

In the District Court of the United States for the District of Oregon

No. L 12711

JAMES RALPH HUNT,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Defendant.

JUDGMENT

This cause came on for trial upon the 15th day of December, 1938, before the Honorable Claude McColloch, one of the judges of the above entitled Court, Plaintiff appearing in person and by his counsel, George L. Rauch and Francis I. Smith, and the Defendant appearing by its agents and counsel, James Arthur Powers, a jury was duly impaneled and sworn to try this cause, the opening statements of counsel were made, witnesses on behalf of the respective parties herein were sworn and introduced evidence for the respective parties herein and after all the evidence had been heard by the jury, the closing arguments of respective counsel were made, the jury was then instructed by the Court and the trial having been adjourned and continued from day to day, the jury did on the 22nd day of December, 1938, return its verdict for the Plaintiff and against the Defendant, and did assess the Plaintiff's damages in the sum of $6,000.00.

Now, Therefore, the Court being fully advised in the premises, It Is Hereby Ordered and Adjudged that Plaintiff, James Ralph Hunt have and recover from Defendant, Union Oil Company of California, a corporation, the sum of Six Thousand Dollars ($6,000.00) and his costs and disbursements incurred herein in the sum of $52.50.

CLAUDE McCOLLOCH,
Judge.

Done and dated at Portland, Oregon, this 22nd day of December, 1938.

[Endorsed]: Filed December 22, 1938. [24]

And afterwards, to wit, on the 29th day of December, 1938, there was duly filed in said Court, a Motion to have judgment entered in accordance with defendant's motion for directed verdict, and to set aside verdict and judgment, in words and figures as follows, to wit: [25]

[Title of District Court and Cause.]

MOTION TO HAVE JUDGMENT ENTERED HEREIN IN ACCORDANCE WITH DEFENDANT'S MOTION FOR A DIRECTED VERDICT AND SETTING ASIDE THE VERDICT AND JUDGMENT AS ENTERED.

MOTION FOR NEW TRIAL AND SETTING ASIDE VERDICT AND JUDGMENT ENTERED HEREIN.

Comes now the defendant and moves the Court for an order of judgment setting aside the verdict and judgment heretofore entered herein and entering a judgment in accordance with defendant's motion for a directed verdict made at the conclusion of the evidence in the within case.

* * * * * * *

Comes now the defendant and moves the Court for an order setting aside the verdict and judgment heretofore entered and for a new trial herein on the grounds and for the reason:

1. That upon the facts and the law the plaintiff has shown no right to relief and that there is an insufficiency of the evidence to justify the verdict and that the verdict and judgment are against the law.

2. Error in law occurring at the trial and duly excepted to by the defendant in submitting to the Jury for construction and interpretation the written documents and agreements of the parties which were for the Court to construe and determine their legal effect as a matter of law.

3. Error in law in permitting plaintiff to retain the fruits of his contract without subjecting him to or imposing upon him the obligations thereof.

4. Error in law in failing to rule that the accepting of [26] compensation payments and other benefits under the Workmen's Compensation endorsement of the policy and the signing of a release on the back of the drafts constituted a satisfaction, release and settlement for the same injuries.

5. On the ground that the defendant was prevented from having a fair and impartial trial by reason of the plaintiff being allowed to introduce during his rebuttal his entire medical testimony in chief and thus depriving the defendant of an opportunity to answer or counteract said medical testimony.

6. Excessive damages appearing to have been given under the influence of passion and prejudice, and there being no competent medical testimony to support the verdict and judgment.

JAMES ARTHUR POWERS,
Attorney for Defendant.
Address: 610 American Bank Bldg., Portland, Oregon.

[Endorsed]: Filed December 29, 1938. [27]

And afterwards, to wit, on Tuesday, the 7th day of March, 1939, the same being the 2nd Judicial day of the Regular March, 1939, term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [28]

In the District Court of the United States for the District of Oregon

No. L-12711

JAMES RALPH HUNT,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Defendant.

ORDER OVERRULING DEFENDANT'S MOTION FOR JUDGMENT ON DEFENDANT'S MOTION FOR DIRECTED VERDICT AND JUDGMENT AS ENTERED AND MOTION FOR NEW TRIAL AND SETTING ASIDE VERDICT AND JUDGMENT.

The above coming on to be heard before the Honorable Claude McColloch, one of the Judges of the above entitled Court on the 11th day of January, 1939, upon Defendant's Motion to have Judgment entered herein for a Directed Verdict and setting aside the Verdict and Judgment as entered, and

upon Defendant's Motion for a new trial, Plaintiff appearing by Francis I. Smith, one of his attorneys, and Defendant appearing by James Arthur Powers, its attorney, and the Court having heard the arguments of respective counsel upon the said Motions; and Memorandum of Defendant's Authorities and answering and replying Memoranda having been filed;

And It Appearing to the Court that Defendant's said Motions should be overruled and the Court being fully advised in all the premises;

Now Therefore, It Is Hereby Ordered and Adjudged that Defendant's Motion to have Judgment entered herein in accordance with Defendant's Motion for a Directed Verdict and setting aside the Verdict and Judgment as entered and Defendant's Motion for a new trial and setting aside Verdict and Judgment entered herein, be, and the same are, hereby overruled.

Dated this 7th day of March, 1939.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed March 7, 1939. [29]

And afterwards, to wit, on the 10th day of March, 1939, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit: [30]

[Title of District Court and Cause.]

MEMORANDUM OPINION DENYING MOTION FOR NEW TRIAL

At the time I denied the Motion for new trial, I stated I would file a memorandum giving my reasons for denying the Motion.

My only serious doubt on the Motion, arose in connection with the defense of assumption of risk, which was submitted to the jury following the ruling that the State Employer's Liability Act did not apply.

Here is a case where station employees were encouraged, under sales pressure, to go off the employer's premises to render services. This is the plaintiff's theory.

Plaintiff testified that the owner of the car which he was called to service, was drunk and could not find the key to the back of the disabled car, where the tools were kept. It then became necessary for plaintiff to use his own short-handled jack, which he could not fit into position without getting under the car; that he was crawling out when the car slipped from the jack and injured his back. Plaintiff says that if he was expected to answer calls away from the service station to do this kind of work, he should have been provided with a jack which could be operated without having to get under low-slung cars. [31]

The Oregon Supreme Court in several decisions has relaxed the rigors of the common law doctrine

of the assumption of risk. The Oregon Court has referred to the doctrine as "harsh".

It seems to me the question presented is: what duty, if any, the employer owed to the employee under the circumstances presented, rather than assumption on the employee's part of the risks involved in doing this off-the-premises work. The case is not one where an employee used a defective tool provided by the employer and known by the employee to be defective. The employer provided no tool at all suitable for the away-from-the-station work. When the plaintiff reached the disabled car, he might have found the car owner sober enough to let him into his own tools, and there found the same kind of unsuitable jack as the employee's own. Having used the car owner's jack with the same unfortunate result, would it be said that the employee assumed the risk that the disabled car owner would not have had adequate tools?

I understand assumption of risk to apply to normal and known risks of employment, not to unusual and special situations involving danger to the employee (perhaps not fully appreciated by the employee) situations created by the employer's suggestion, it might perhaps fairly be said—insistence.

For analogy suppose plaintiff's superior had directed him to go on a special mission to defendant's down-town office, and plaintiff had been injured while in the down-town office, due to some negligence on defendant's part in not maintaining

proper equipment in the office. Would plaintiff be deemed, as a matter of law, to have assumed the risk of such negligence? I think not.

The jury, by its verdict, found, as a matter of fact, that plaintiff did not assume the risks connected with the special mission of going to fix the car. [32]

As to defendants' other point, that plaintiff could not accept "compensation" for hospital and medical services, as he did, without extinguishing his entire claim, the Oregon cases seem to me to be against defendant. They indicate that a plaintiff can accept payments "on account." This was plaintiff's theory here. The plaintiff confessed payment for loss of services and payment of doctor and hospital bills. Making no claim for those items, he sued for the pain and suffering, and for the disability which he claimed resulted from the accident. This I think he could do.

CLAUDE McCOLLOCH,
Judge.

Portland, Oregon, March 10th, 1939.

[Endorsed]: Filed March 10, 1939. [33]

And afterwards, to wit, on the 31st day of May, 1939, there was duly filed in said Court, a Notice of Appeal in words and figures as follows, to wit: [34]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To James Ralph Hunt and George L. Rauch and Francis I. Smith, his attorneys:

Notice is hereby given that the Union Oil Company of California, above named defendant, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and the whole thereof entered in this action on the 22nd day of December, 1938, and which judgment became final upon an order entered in this action on March 7, 1939, denying defendant's motion for a new trial and to set aside the judgment.

JAMES ARTHUR POWERS,
Attorney for appellant, Union Oil Company of California.
Address: 610 American Bank Building, Portland, Oregon.

[Endorsed]: Filed May 31, 1939. [35]

And afterwards, to wit, on the 7th day of June, 1939, there was duly filed in said Court, a Designation of contents of record on appeal, in words and figures as follows, to wit: [36]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant Union Oil Company does hereby designate the following portions of the record, pro-

ceedings, and evidence, to be contained in the record on appeal in the above entitled cause:

1. Plaintiff's 3rd Amended Complaint;

2. Defendants' Answer to 3rd Amended Complaint;

3. Pre-trial order formulating issues;

4. Verdict and judgment entered therein;

5. Defendants' joint motion for directed verdict and motion to set aside verdict and for new trial;

6. Order denying joint motion, showing date filed;

7. Memorandum opinion of Court, denying joint motion for new trial and for directed verdict;

8. Portions of the testimony of witnesses: James Ralph Hunt, Harry G. Hadfield, A. M. Russell, as set out in the condensed narrative statement of material evidence and material portion of exhibits; condensed statement of the issues; designation of points to be relied upon on appeal; motion for non-suit and order entered thereon during trial; Court's charge to the Jury and proceedings had in connection therewith including objections to instructions and failure to instruct; all of the foregoing under this number being contained in appellant's condensed narrative statement of material evidence and material portions of exhibits, and issues raised during trial and points designated on appeal;

9. Notice of Appeal.

JAMES ARTHUR POWERS,
Attorney for Defendant Appellant. Post Office Address: 610 American Bank Bldg., Portland, Oregon.

[Endorsed]: Filed June 7, 1939. [37]

And afterwards, to wit, on the 22nd day of August, 1939, there was duly filed in said Court, a Stipulated Narrative Statement of Evidence, in words and figures as follows, to wit: [38]

[Title of District Court and Cause.]

CONDENSED NARRATIVE STATEMENT OF MATERIAL EVIDENCE; MATERIAL PORTIONS OF EXHIBITS; ISSUES RAISED DURING TRIAL; AND POINTS DESIGNATED ON APPEAL.

JAMES RALPH HUNT

Plaintiff, a young man now about 25 years of age, entered the employ of the Union Service Stations, Inc., in August, 1933. Prior thereto he had various employments such as painter's helper, baker's helper, carried a newspaper route, etc. He was a high school graduate and had been active in athletics. When he entered the employment of the Union Service Stations, Inc., he first was given a two weeks training course where he was taught the

(Testimony of James Ralph Hunt.)

general work required of a filling station attendant. He then commenced work at a regular filling station as an assistant and gradually worked up to the position of first assistant and was in charge of the service station when he was there alone. On June 12, 1934, plaintiff, while working as a service station attendant for the Union Service Stations, Inc., and while using a tire iron in connection with the repairing of a tire, and exerting force with the tire iron which slipped, he fell forward and felt a sudden severe snap in the lower portion of his spine, which momentarily paralyzed him. He had never had any trouble with his back before and he could and did up until that time engage in strenuous athletics. [39]

(Transcript P. 6 Lines 24-25) "A. I played baseball every Sunday. Even after I went to work for the Union Oil Company I continued to play baseball in the evenings and on Sundays.

Q. What team did you play with?"

(T. P. 7 Lines 1 to 8) "A. I played with the Union Avenue Merchants.

Q. And what was your ambition, what were you working towards?

A. Well, I had had quite a bit of success in baseball, and the men that were in a position to help me along told me that if I would continue that I possibly would some day be a professional baseball player."

(Testimony of James Ralph Hunt.)

(T. 13) "Q. Will you describe to the jury how you were hurt in June 12th, 1934.

A. On the 12th day of June, 1934, a man came in with a tire to be repaired, and I was on duty at the time and I went to work on this tire. We had a long tire iron [40] there and a short tire iron, and I would take this short tire iron and hook it into the tire and take the large, slender tire iron, and the end of this tire iron was broken off at the time, and bring it into the tire and remove the—take a bit at a time to lift this tire up over the rim. Well, I put the large tire iron in and pried down on it, and as I pried on this tire iron the tire iron slipped and I fell forward, and at the time something snapped in my back just like it was an elastic band, I could hear it pop, and I fell down to the pavement and for two or three minutes, why I didn't have any use of my legs at all, they were paralyzed, and after I got the use of my legs I went into the station and I gave up all hopes of fixing this tire."

Plaintiff reported the matter to his employer who sent him to Dr. Simmons, a company doctor, for medical treatment.

(T. 15, 16) "Q. Who was Dr. Simmons?

A. Dr. Simmons was the company's medical doctor, general practitioner. And Dr. Simmons took and taped me up with adhesive tape. He

(Testimony of James Ralph Hunt.)

taped me from my hips to my shoulders, and he told me to wear that tape for three days and then to come back to him. Well, I returned to work, and for three days I worked and during this time, why the pain continued to get worse, and at the end of three days, why I went back to Dr. Simmons and Dr. Simmons asked me how I felt and I told him my back was no better, it was aching just as bad as it had been, and he suggested that he call Dr. Dillehunt. He did, and Dr. Dillehunt told me to come up to him; Dr. Dillehunt is the company's chief surgeon, and I went to see Dr. Dillehunt and he removed the tape from my body and examined my back, and I told him just what had happened and he said that—rather, he took a corset effect that he had there and put me in this corset with instructions that I was to wear this corset and not to do any heavy work of any kind or strain myself, and to wear that corset until they could make a brace proper for my back, and he sent me home and told me that I could return to work. I went back to work and I didn't do any hard work, just puttered around the station, put gas in the cars and check tires, and then went back after about the tenth day and got this new brace, and then he told me to wear this brace and return to work, with instructions that I was to do light, easy work. I went back to work, and then I did

(Testimony of James Ralph Hunt.)

this light work around there for a while. My back continued to bother me all the time. I couldn't lift anything heavy or strain myself, but as time went on, why the work increased at the station and I got in and I had to do my part of the work. I lubricated cars and I strained myself, and I repaired tires.

Q. Now, you say this back bothered you. Just what do you mean by that?

A. Well, it was a constant pain there. If I would strain myself the pain would go up from my back and it would ache, I would have to sit down and rest, and it made me irritable, and there was always a dull ache right between my hips." [41]

The back brace which plaintiff wore, fit up under his shoulders and extended down to his hips and supported his back in a rigid position. He was not comfortable without the brace and took it off only at times at night when he went to bed. Plaintiff continued to wear this brace and was wearing it on November 5, 1934, while working alone as attendant in charge of a filling station for the defendant Union Oil Company. The Union Oil Company had taken over all the assets and assumed all the liabilities of the Union Service Stations, Inc. The Union Oil Company had owned all the stock of the Union Service Stations, Inc., and certain property was absorbed by the Union Oil Company on July 1, 1934, the service station where plaintiff was

(Testimony of James Ralph Hunt.)

working being one of the properties which was taken over by the Union Oil Company and plaintiff continued along with his work at this same filling station but commencing July 1, 1934, was carried as an employee of the Union Oil Company instead of the Union Service Stations, Inc., which was on that day dissolved. On November 5, 1934, as referred to above, plaintiff, while working at said service station alone received a telephone call from some individual whom he could not identify by name, to come and change a flat tire. The car with the flat tire was located at a distance of about a mile and a half from the service station where plaintiff was working and was located only a few blocks from another Union Service Station, the plaintiff testified: [42]

(T. P. 81 Line 16 to P. 82 Line 16) R. Hunt

A. That is right, I worked with my brace on.

Q. About how often would you go out changing a tire?

A. Well, whenever the calls came in. It is hard to tell just exactly how often we went out.

Q. Well, just tell the jury your best recollection now about how often you would leave the station and change a tire.

A. Well, you would average one or two, maybe four tires a week, to go out to service on a customer's yard or out on the street in front of the station or down the street from the station, whenever the call happened to come in.

(Testimony of James Ralph Hunt.)

Q. Well now, when you got down to change this tire you said you used your own jack?

A. Yes, sir.

Q. Now, your own jack, was there anything wrong with it especially?

A. No, it had been working right along.

Q. And it was all right for your car, was it?

A. It worked on my car.

Q. What was wrong with it for this car?

A. There apparently wasn't anything, there shouldn't have been anything wrong with it for this car.

Q. Well, was there anything wrong with it for this car?

A. Well, when I used it and got the car jacked up the car slipped off the jack.

Q. It slipped off the jack. Now, you claim in your complaint here—— [43]

(T. P. 83 Line 1 to P. 92 Line 16.) R Hunt

A. A cold, rainy day.

Q. Well, when you got there did you talk with the man that called, or anything?

A. The man that called, I rang his apartment, and he had been on—he was drunk.

Q. He was what?

A. The man was drunk, he had been drunk for all that night.

Q. Drunk?

A. Yes, sir, and he said that is why he didn't change his own tire, and so then I called

(Testimony of James Ralph Hunt.)

him down and he went down to the car with me. He finally came downstairs with the keys.

Q. I see, and was he out there while the car fell on you?

A. Oh, he was standing around there for a while and then he went back in, and then he came back out.

Q. What was his name, do you know?

A. I don't know the man's name.

Q. Well, did you ask him to help you?

A. Well, he couldn't help me. He couldn't help himself, hardly.

Q. Well, when he telephoned you did he sound kind of——

A. Well, he sounded kind of funny over the phone, but you couldn't always tell the condition.

Q. Well, what did you do there? Just to kind of go over that a little bit, he gave you the keys, did he, to get the wheel off of the spare or how was it?

A. Well, he had a little lock gadget on the back end and he gave me the keys and I took the jack out of my car and got down on my hands and knees and slid back underneath this trunk rack affair under the car and put this jack under there.

Q. And you got right to work, so to speak?

A. Surely.

Q. And then did you jack the car up?

(Testimony of James Ralph Hunt.)

A. Then I proceeded to jack the car up.

Q. You got it up all right? [44]

A. I got it up.

Q. And then what happened?

A. Then I pushed myself back and got underneath the trunk rack end of it and started to raise myself up to get out, and this thing came down and struck me across the hips, and then for a few minutes I just laid there.

Q. The car fell off the jack? A. Yes.

Q. What did it land on, the wheel, the flat tire? A. It landed on the flat tire.

Q. Did you know it was going to fall?

A. No, I didn't know it was going to fall.

Q. It just fell? A. It just fell.

Q. Well now, you say that jack of yours was safe enough?

A. Well, I thought it was safe enough. I had used it before.

Q. It didn't have anything to do with it there; as far as your jack was concerned, you felt it was all right to use?

A. Yes, sir.

Q. Now, you complained in your complaint about not furnishing you with an able bodied assistant. What would you have had the able bodied assistant do if you had had one along with you?

(Testimony of James Ralph Hunt.)

A. Well, if I had had an assistant along with me he'd have got down there under the car and jacked it up.

Q. He would have got hit in the back then instead of you?

A. Well, he probably would have.

Q. Well, only one man works under a car anyway, isn't that a fact.

A. That is a fact.

Q. It wouldn't have taken both of you under there? A. No, but the——

Q. What is that? [45]

A. I didn't say anything.

Q. Well now, what was wrong with that jack as far as operating on this particular car was concerned?

A. It was a short handled jack. You had to climb back underneath the car and insert a small little handle into it and jack it up, and it had a flat top on the jack. It might have had a prong tip jack to clamp around that axle and hold it on.

Q. Couldn't you reach it from out in back?

A. No, sir.

Q. Well, why was it you couldn't reach it?

A. Well, understand my back is stiff all the time, and with that brace on there was no give. I had to be in straight position to work on the car.

Q. Well, as I understood you to say, the handle was too short?

(Testimony of James Ralph Hunt.)

A. Yes, this was a short handled jack.

Q. And you were complaining because it didn't have a longer handle there, one of those that fold up?

A. It could have had a folding up handle that extended out beyond the rear end.

Q. You say there were lots of those around? A. There was.

Q. And when did they come out?

A. Oh, they had been out quite a while.

Q. Did they come out when they had longer rear ends to cars?

A. Yes. Those cars were out in '29 and '30, back in there.

Q. But you didn't have that type with your car? A. No, sir.

Q. They came with the cars that had the trunks, the longer rear ends, as I understand it, is that correct?

A. That is right, and then you could have bought those jacks on the market. They were for sale.

Q. Well, there was nothing to keep you from taking the jack out of this car if your handle was not long enough and use the jack that was furnished in that car, was there? The man was there and you had his keys? [46]

A. His jack was broke. He told me his jack that he had was not any good. I asked him about the jack.

(Testimony of James Ralph Hunt.)

Q. Well now, I went over carefully with you just what took place there a while ago and you didn't mention it at that time. I asked you just what you did and you said you couldn't get any help from him, he was kind of drunk. A. He was.

Q. Did you look at his jack?

A. I looked into—I was in the front end of his car.

Q. You just kind of omitted to tell the jury that here before when I asked you to state everything you did and you said you went there and opened up that little lock that he gave you and then you got under and put your key or your jack under there and started jacking away. Now you say his jack was broken.

A. Well, he told me his jack was not workable.

Q. Did you ask him that over the phone?

A. No, sir.

Q. So you met a new situation when you got down where the car was that you didn't anticipate back at the station?

A. That is right.

Q. You planned you would use his jack?

A. I didn't plan anything.

Q. Well, you knew what kind of a car it was? A. That is right.

Q. You knew your jack handle was not long enough?

(Testimony of James Ralph Hunt.)

A. But I knew I could get down—I had been getting down and climbing underneath these cars before to jack them up.

Q. You had used your own jack?

A. Yes, sir.

Q. And that was good enough for you, was it?

A. It had to be, there wasn't anything else.

Q. Well, I mean you had been back there at that station and there was a long handled jack there, wasn't there?

A. Yes, sir. [47]

Mr. Powers: May we have that jack, please?

(A jack was thereupon brought into the court room.)

Q. Is that the jack or the type jack that was in use there at the station?

A. That is not the jack that was there at the station. However, it is a similar jack to it.

Q. One similar to it? A. Yes.

Q. And are these the tire irons?

A. No, sir.

Q. Not like them at all?

A. Those are not like the tire irons.

Q. Well, now, the other jack—this is called a Weaver jack. That is the same make, was it, that they had there at the station?

A. Yes, sir.

Q. But you say this isn't the same jack?

A. No.

(Testimony of James Ralph Hunt.)

Mr. Powers: They have already been marked and agreed upon there at the pre-trial. We will just offer them in evidence at this time.

The Court: They are admitted.

(The tire irons and jack so offered and received, were thereupon marked received as Defendants' Exhibits 6, 7, and 8.)

Mr. Powers: Q. It was a jack that looked like this, but not this jack? A. Yes.

Q. And how do you know that? How do you know this isn't the same jack?

A. Well, the reason I know it isn't is because when I was at Thirteenth and Broadway Ted McGrath, the manager there, went over to Station 73 and took the jack out.

Q. And about what month would that be?

A. Well, I imagine it was along in the latter part of '36—'35, rather.

Q. Along in the fall there some time of '35?

A Around the holiday season. [48]

Q. It was after you went back to work there at Thirteenth and Broadway?

A. That is right.

Q. They just changed jacks there, you think? A. Yes, sir.

Q. Now, with this jack you don't have to get under a car? A. No.

(Testimony of James Ralph Hunt.)

Q. Well, let's see, before you went down there you had been alone at the station, you said? A. Yes, I had.

Q. For how long a period?

A. Oh, I had been alone there for from about one o'clock until approximately twenty minutes after two or twenty minutes to three, when Snell came around.

Q. During that time you were in charge of the station? A. Yes, sir.

Q. Now, when this call came in there was a closer station, Union Oil Station, to the place where the tire was to be fixed, isn't that true?

A. Yes, sir.

Q. And was there anything to keep you from calling that other station and have someone over there or call some station where they had some extra men if you wanted a man to go down there and get it changed?

A. Well, there were several reasons why we didn't do that. We want the business in our station; this was our customer. At that time there was a quota system on the work that we did, and all service work counted in this system and we naturally wanted the work for ourselves.

Q. But if you had been there alone like you were you could have called that other station and had someone else go over there, couldn't you, and fix that tire?

(Testimony of James Ralph Hunt.)

A. I could have, yes.

Q. Well, I mean it was more or less up to you, you were there in charge and you were there alone at the time the call came in, you had to decide yourself whether you would call up there? [49]

A. Well, it was getting around at the time I knew very shortly when someone would be back and we could do the work ourselves and he was willing to wait.

Q. Well, the reason you didn't call up anybody else was because of that quota system, you wanted that business yourself?

A. That is right. He was our customer and we wanted to take care of him ourselves. You remember he was pretty close to that station and if they had serviced his car we'd have probably lost the customer.

Q. And you would have lost something by that, wouldn't you?

A. We would have lost his business.

Q. Yes, but I mean you had some quota system there you were working on?

A. That is right.

Q. So you didn't ask anybody to furnish you with any able bodied assistant then at that time?

A. I asked Mr. Snell to do the work. I didn't have anyone to ask to furnish me with one.

(Testimony of James Ralph Hunt.)

Q. Yes. Well, Mr. Snell wasn't even on duty yet?

A. No, but he was there, he could have easily gone.

Q. But he didn't go to work until three, did he?

A. That is all right, it is not out of the ordinary to go to work sometimes before you are due on duty. If you would come around the station early you would go to work early.

Q. Well, if he had been there earlier when you were in charge you could have told him what to have done, but he hadn't come to work yet?

A. I didn't have any authority over Mr. Snell.

Q. But you were in charge there?

A. Yes, but he didn't have to take orders from me.

Q. Well, if you were left in charge he would have?

A. It was not understood that I was to give orders there.

Q. No, but you were in full charge when you were there alone?

A. When I was alone, surely. [50]

Plaintiff left the station in charge of Snell, another employee who was scheduled to come on duty shortly thereafter. Plaintiff drove his own car in going to the place where the tire was to be changed.

(Testimony of James Ralph Hunt.)

There was a four-wheel jack with a long handle on it, known as a Weaver Jack, at the service station, which jack permitted a car to be raised without crawling under it. Plaintiff did not take this jack with him as it was too heavy for him to manage. He testified that if an able-bodied man had put the jack in his car, he would not have been able to take it out alone when he got to the place where the tire was to be changed.

(T. 20, 21) "A. It was a cold day, a cold rain, and this call came in and at the time I was there alone. Shortly after this the relief came on, at approximately twenty minutes to three, and he said that he would watch the station while I went out to repair this flat tire. Now, I went down to—got into my car and drove down to repair this tire. When I got there the car was down and the right rear tire was flat, and I took my jack out of my car, which was a typical little Ford jack.

Q. Now, just a minute. What jack, if any, did the company provide for you to do that work?

A. Well, at that time the company didn't provide any jack that we could take out on a service call.

Q. What kind of a jack did they provide, if any?

Q. On the station lot there was a large, heavy jack there of the type that rolls on four

(Testimony of James Ralph Hunt.)

wheels that you could pull around with a large extension handle on it, and this jack was too heavy, I couldn't have lifted it, taken it out on the call; and if I got—if someone could have put it in I could never have gotten it out of my car. Also this jack, we didn't use it whenever possible because it had a habit of slipping, and when you get the car up you couldn't always get it down. You have to shake and jiggle the handle to get that jack to lower, and so I went on to this job with my own jack.

Q. Now, what kind of a jack was that?

A. My jack was a regular Ford jack. It was the regular Ford equipment that came in a Model "A" Ford.

Q. Now, just explain to the jury how it operated.

A. This was a regular model—practically a Model "T" jack. It worked on the ratchet type. You jacked it up and it would go up one notch at a time to raise your car to the proper level.

Q. Now, in order to use that jack where did you have to be?

A. Well, in order to use that jack you would have to crawl back under the car and place it under the axle. This particular car was a '30 Plymouth sedan. It was a low car, and on the back there was a trunk rack, and the trunk resting on this rack. Now, in order to place this jack under the rear axle——

(Testimony of James Ralph Hunt.)

Q. Just let me interrupt you a minute. I want to ask you more about the jack. Was that the only form of jack that was available in the community at that time?'' [51]

* * * * * * *

(T. 21 to 24) R. Hunt

A. No. At that time there was a screw type jack that worked on the order of a telescope.

Q. Were those general or scarce at that time?

A. They were a general jack; they were quite common, and this particular jack you place under the car and it had an extension handle that would extend out practically any length you wanted to extend it, and you could stand back and twist this handle and raise your jack.

Q. Was that equipped in any way to prevent it from slipping from the axle, or whatever you placed it against?

A. The screw type jack had—on the jaw of the jack it had sort of prongs that would fit up around the axle to keep the axle of the car from slipping off the jack.

Q. Now, in operating them with an extension handle can you state whether or not it is necessary to be under the car?

A. No, it was not necessary.

Q. And can you explain to the jury the difference between those two forms of jacks?

(Testimony of James Ralph Hunt.)

A. Well, the short Ford jack that I was using was a very frail jack. It had a flat platform on the back of the jack. You had to crawl under the car and place it under the axle and place in a little hand lever, and it went up a notch at a time, and the other jack, the screw type jack, was made on the order of the telescope jack. You would put the jack under the car and then the extension handle would extend beyond the rear of the car. You would twist this handle and the jack would raise. It would go up a certain part and then another section would come out and it would go up until you raised the car to the proper level.

Q. Now, you have stated that one of those tires was flat on this car. What kind of a car did you say it was?

A. It was a '30—it was either a '30 or a '31 Plymouth sedan. It was that series, it was the same type car.

Q. And how are they built with respect to their rear?

A. Well, the rear of the car sits down quite low.

Q. With respect to the axle itself?

A. That car with the tire uninflated, it is down within ten inches of the ground, the axle is. [52]

(T. P. 21 Line 16 to P. 34 Line 12) R. Hunt

Q. That is, when the tire was deflated?

A. When the tire was deflated.

(Testimony of James Ralph Hunt.)

Q. Was the tire deflated when you arrived there? A. Yes, it was.

Q. Which one?

A. The right rear tire was flat.

Q. And where is the end of that type of car with respect to the axle, do you remember?

A. Well, the end is approximately, oh, I would say around six inches below—it drops about six inches below the axle.

Q. I am talking about the distance from the axle, its transverse position in the car to the end of the car.

A. Oh, it must have been in, oh, probably a yard from the end of the car.

Q. Then I believe you stated there was something else attached to that car. Was there something attached to the car?

A. And to the end of the car there was a trunk rack that extended, oh, another yard, practically a yard out beyond the end of the car, and on this trunk rack there was a trunk that set on top of the—that set on the back end of the car.

Q. Now how much clearance was there, if you remember, between the bottom parts of that car and the pavement?

A. Well, between the bottom——

Q. With the tire deflated.

(Testimony of James Ralph Hunt.)

A. With the tire deflated, between the bottom of the car and the pavement would be approximately, oh, six inches clearance.

Q. Six inches?

A. Around six inches.

Q. And when it was inflated was there a difference?

A. When it was inflated, why the distance between—well, I know between the axle and the ground was around thirteen or thirteen and a half inches.

Q. And do you know whether or not that carried out the same way to the rear? [53]

A. It carried out practically the same to the rear end.

Q. Then how much space did you have to crawl under, if you crowled under there?

A. Well, in the rear, under the rear end of the car I had practically between six and eight inches to get under that car.

Q. And then just state what you did.

A. Then after I got under there I took this small Ford jack and jacked the car up to a height of practically, oh, another six inches, high enough to get the flat tire off of the ground so that I could remove the tire, and after I got this car up to the proper height, then I backed out; I had to back out, and as I got back underneath the hoist—not the hoist, but the rack on it, I had to elevate and hoist my

(Testimony of James Ralph Hunt.)

hips up, and as I did, why the car slipped and came down and struck me across the back. For a few minutes I don't remember what happened, everything went black, and when I regained my consciousness the first thing I was aware of was the pain in my back around where I had been—below this brace. Up until the time I had this brace—just below the center part of this brace and in the lower part of my back there was a sharp pain there and I didn't have the use of my legs, they would hardly move, and I laid there for a time and finally shoved myself out from under the car. I got up to my feet——

Q. Now, may I ask this: Did you have the brace on at that time?

A. I had the brace on at that time. I wore the brace all the time.

Q. Now, was that during the time when you were doing less than full work?

A. At the time when I was doing less than full work, you say?

Q. Yes. Were you doing all the work that was to be done about the station at that time?

A. I was doing all the work that was to be done about the station at that time.

Q. Were you lifting heavy tires?

A. I was lifting tires and changing tires and working on them.

Q. And wearing this brace?

(Testimony of James Ralph Hunt.)

A. Wearing the brace at all times. [54]

Q. Well now, state how you were—just what steps would you have gone through to have taken that tire at that time had you not had the accident?

A. Well, if I had gotten the tire off of the wheel, when I got it off, why I would have rolled it over to my car and opened the door and rolled it up against the fender—not the fender, but the running board of the car, and braced it, lifted it up and rolled it right in there, take the back end of it and just push it up over the running board and roll it into the front seat. That is where I had to carry all the tires or anything that I had to carry, was in the front seat.

Q. Could you lift that tire at that time?

A. No, I couldn't.

Q. What did you do in your regular work when you had something like that to do?

A. Well, when I had something that was too heavy, if I had to bend down, I couldn't bend down, I would squat down to lift it up, and if anything was beyond my means of lifting, if I couldn't lift it at all, why I would have to have help to do that.

Q. Is that the way you were doing your work at that time?

A. At that time, changing tires and things, I could do by myself.

(Testimony of James Ralph Hunt.)

Q. Now, at this time, as I understand it, you found yourself under the car, and were you having any trouble in moving your legs?

A. Yes, my legs couldn't move. I could get very little action out of my legs, and there was this pain in the lower part of my back. Finally I got to move my legs around and I took my hands and shoved myself out beyond the end of this car and got myself on my feet, and I realized then that I couldn't change the tire, so I got into my car and started it up and had an awful time driving it because this pain was getting worse all the time. It ached, and there was a sort of numbness in my legs, and I drove the car approximately four blocks to the next Union station down on Union Avenue and Oregon street, and I drove in there and the boy in attendance, his name was Everett Keith, and I told him what had happened, that the car had fell down and struck me across the hips and that my back was aching and that I didn't have very good use of my legs, and I——

(An objection was here interposed; objection sustained.)

Mr. Rauch: Q. All right, you don't need to tell what you told him. [55]

Just state what was done.

A. So, well, I slid over—when I got there I knew I couldn't drive the car back, so I got

(Testimony of James Ralph Hunt.)

on the other side of the car and Everett Keith drove the car back up to the other man's car, the one with the flat tire.

Q. Where was that place?

A. It was on First and Williams avenue.

Q. That is where the car that had the flat tire was?

A. That is where the car that had the flat tire was.

Q. And you got the man to help you from what place?

A. From Union and Oregon, the Union service station on Union avenue and Oregon.

Q. Could you state how far that was away?

A. It was approximately five blocks from First and Williams avenue.

A. Well, state what happened there. Did you get him to go? Who drove the car?

A. He went with me. My back was aching so bad I knew I couldn't drive, so I slid over and he got in and drove the car back to Union avenue and First. When we got there I stayed in the car because I didn't feel like getting out, and he got out and crawled under the car and jacked it up and changed the tire, and after he got the tire off, why he threw his tire into the back end of my car and climbed in and drove me back to my station at Union avenue and Fargo street.

Q. What did you do then?

(Testimony of James Ralph Hunt.)

A. When I got up there, why the manager, Herman Timmer, was there, and the relief man——

Q. Who was that?

A. Herman Timmer, the manager, was at the station, and the relief man, Peter Snell.

Q. Who was Mr. Timmer as far as you were concerned?

A. Well, Mr. Timmer, as far as I was concerned, he was my boss in the service station; he was the manager of the station.

Q. Was he there when you left?

A. No, he was not there when I left. When I returned he was there and he wanted to know what happened. He asked Keith what he was doing with me and he explained to Timmer that the car had fallen down and struck me across the hips, and also explained to Mr. Snell what had happened. The boy Keith that drove me up there got out of the car, and during this time, why the pain in my back got [56] so bad that I didn't want to stay around there any longer, and I told them I would go home. So I managed to get the car rolling and drove practically a mile home. When I got home I drove up in front of the house and got out of the car. I pulled my legs around and got out on the edge of the curb, and I had to rest for a while and finally got up as far as the front door and rattled the door and my wife

(Testimony of James Ralph Hunt.)

came to the door and let me in, helped me into the room and eased me down to the davenport and took my shoes and stockings off and asked me what happened, and I tried to explain to her, but during this time I didn't feel like talking, there was constant pain, and so I told her she had better call Dr. Dillehunt, and she called Dr. Dillehunt and told him that I had been hurt and he said for us to come right down to the office.

Q. Did you tell her that you had had an accident? Were you able to tell her that?

A. I told my wife that a car had fallen on me, I had hurt my back. Other than that I didn't tell her much more.

Q. Did you hear her call Dr. Dillehunt?

A. Yes, I did.

Q. Do you know what she told him?

A. She told Dr. Dillehunt that I had hurt my back and that a car had fallen on me, and he said for us to come right down to the office.

Q. And did you go?

A. And then the wife got my shoes and socks back on me and put a heavy coat around me, because during this time I was having chills, my back was aching, and then she helped me out to the car and drove me from our house down—we lived on Missouri and Mason at the time, and she drove me from there down to the Medical Arts Building.

(Testimony of James Ralph Hunt.)

Q. Now, what I ask with regard as to what day it was, regardless of whether it was October or November, can you state whether or not that was the same day you were hurt?

A. That was the same day I was hurt.

Q. The same day the car fell, I mean.

A. The same day the car fell on me, it was that afternoon.

Q. And you went to Dr. Dillehunt's office?

A. I went to Dr. Dillehunt's office.

Q. Go ahead and state what happened.

A. We got down town and the wife helped me out of the car and braced me while I walked down the street into [57] the office. We got into Dr. Dillehunt's office, and by that time I hardly had any use of my legs at all and the pain was getting worse, and he looked at me and he said, "Well, I can't do anything for you now", and he asked me what had happened and I explained to him that this car had fallen and struck me across the hips and that I didn't have any use of my legs hardly at all, and he said, "Well, you had better go back home and go to bed and stay in bed for five days and return then", and so the wife took me home and when we got home, why she helped me upstairs and undressed me and took the brace off of my back and put me to bed.

Q. I want to ask you, was your wife there when you told Dr. Dillehunt that a car had fallen on you? A. Yes, she was.

(Testimony of James Ralph Hunt.)

Q. And you told him that?

A. I told him myself.

Q. Just tell the jury then what happened when you told him that.

A. Well, Dr. Dill——

Mr. Powers: He has just gone over it once. He has covered that.

Mr. Rauch: Q. My question is, what happened in the office when you told Dr. Dillehunt that the car had fallen on your back? Now, just a minute. The Court may wish——

The Court: Go ahead.

A. Well, Dr. Dillehunt looked at me, and I was in such pain he didn't say anything. He saw how I was suffering, and he said, "You go home", he said, "I can't do anything for you". He said, "The condition you are in, you go home and go to bed and stay in bed for five days". So the wife took me home and undressed me, took this brace off and got me into bed. Well, after I got to bed I laid there on my back for five days, and during that time, well, when I wanted to move or to get any comfort at all she had to turn me on my side and brace me up with pillows. I didn't have strength enough, and my legs wouldn't move the first three or four days. I didn't have hardly any movement at all in my legs to twist my body, and she would come and roll me from side to side and brace me up with pillows.

(Testimony of James Ralph Hunt.)

Mr. Rauch: Q. A little louder, please, Mr. Hunt.

A. And this continued. She fed me in bed, and she had to take care of me. I couldn't get up to go to the lavatory. And at the end of the fifth day, why she dressed me and took me back to Dr. Dillehunt's office. Prior to this, why after I got home that afternoon, why the wife had to call Mr. Russell and report that I couldn't go to work because I had hurt my back, the [58] car had fallen on me; rather, she told him that I had hurt myself, and he came to the house.

Q. When did he come?

A. Oh, I think it was the next afternoon he came out to our house, or that evening.

Q. Did you talk to him about that?

A. And I talked to Mr. Russell and explained to him just what had happened to me, that I had jacked this car up and it had fallen down and struck me across the hips.

Q. Is Mr. Russell here?

A. Mr. Russell is here.

Q. Which gentleman is he?

A. The gentleman at this table (indicating). Then that is the last time I saw Mr. Russell. Then on the fifth day my wife dressed me and took me back to Dr. Dillehunt's office. We went up to his office and he took me up to a little room and set me on the edge of a little

(Testimony of James Ralph Hunt.)

regular operating table, and at that time he removed my brace and examined me and tested my knees for reflexes and pulled my legs and bent my back both forward and backwards and held a general examination, and after that a visiting surgeon from New York City came in and did the same thing, went through the same examination, and also Dr. Lucas, Dr. Dillehunt's associate, performed practically the same examination. Well, after that——

Q. How did that make you feel?

A. Well, I didn't know what to think. They didn't say anything, they just kept examining me during this——

Q. Could you sense their motions?

A. Well, I knew there was something wrong because they wouldn't comment, and Dr. Dillehunt usually would talk all the time he was in there and tell me just what——

Q. Did these movements have any effect on you? What was the effects of these movements on you?

A. Well, when they would bring my legs backwards or bend me backwards or forwards there was always a pain there that pained continuously.

Q. Did these pains or these movements increase or decrease the pain?

A. These movements increased the pain. After these three examinations, why Dr. Dille-

(Testimony of James Ralph Hunt.)

hunt came in and told me that I would have to have an operation. He turned to my wife, he always called my wife "Ma", and he says, "Well, Ma," he says, "we are going to have to operate on him." [59]

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(T. P. 35 Line 11 to T. P. 36 Line 14) R. Hunt

A. And so Dr. Dillehunt said, "This operation will probably take effect immediately as soon as I get—within a short while". He says, "Will you be ready?" And I said, "Yes", and with that I returned home, continuing to wear this brace with the instructions that I was not to do any work at all, just to take it easy, and spent approximately two or three days around home doing nothing, and after a short while my legs began to feel better, they bothered me less, and if I would strain myself or drive too much or exert myself I would get—the pain would increase right along. I went down to the company office and Mr. Russell told me that if I wanted to I could come down there and work an hour or two, fuss around at the office, or if I didn't want to work I didn't have to. So some days I would go down there and I would work an hour or so and then go home. If it was much longer than an hour, why the pain would get so bad that I couldn't stand up or sit down either, so I would go home and lay down and rest. Well, that continued for about

(Testimony of James Ralph Hunt.)

two weeks, and then I would stretch it along until I got so I was staying two and three hours a day, and during this time, why——

Q. Will you state whether or not you were wearing the brace at this time?

A. I was wearing the brace at all times, and I would go out and get credit card applications and I would run errands and help him around the office, and during this time I was on full time payments. Mr. Russell says, "We don't want to report this as loss time accident"——

Q. How is that?

A. Mr. Russell stated he didn't want to state this as a loss time accident.

* * * * * * *

(T. P. 36 Line 23 to T. P. 37 Line 1)

Mr. Rauch: Q. Did you continue to work for the company then?

A. Yes, I continued to work.

Q. Was there any deductions from your pay? A. No deductions from my pay.

* * * * * * *

(T. P. 38 Line 13 to T. P. 40 Line 8)

Q. Now, we will go back to the time when you were working following the accident and wearing the brace, as I understand was your last testimony about that, and what kind of work were you doing?

(Testimony of James Ralph Hunt.)

A. Well, I was doing light work around the office.

Q. When you worked around the office, that is what I mean, what did you do?

A. I went out and secured credit card applications. The company was getting some new leases at that time to build service stations, and I took leases around [60] on several occasions and had them signed, and I also helped Mr. Russell around the office. If he had any communications to carry out to the boys around the service stations I did that, and odd jobs, whatever he would instruct me to do. Also——

Q. Yes, and how long did you continue that?

A. Well, I continued that from shortly after I was hurt up until the 28th day of February, 1935.

Q. What happened then?

A. On the 28th day of February, 1935, I received instructions that I was to go to the hospital for an operation, which I did, and on the 1st day of March, 1935, they operated on me.

Q. And now how did you come to have that operation? How did you come to go to the hospital for that operation? How did you come to go to the hospital for the operation?

(Testimony of James Ralph Hunt.)

A. Well, as a result of this car falling on me.

Q. No, I don't mean that. Did anyone bring that to your attention?

A. Well, Dr. Dillehunt told me to go to the hospital on the 28th day of February.

Q. And you went?

A. And I went at his instructions, yes.

Q. Who went with you?

A. Well, nobody went to the hospital with me. He just told me to go up there. My wife went up there with me that night.

Q. Did you go alone?

A. My wife went with me.

Q. Your wife went with you?

A. Yes.

Q. On the night of the 28th of February?

A. On the night of the 28th of February.

Q. And did they operate on you?

A. They operated on me on the morning of the first of March.

Q. And state what you next remember.

A. Well, I remember that morning they took me up to the operating room. They went through the usual procedure. [61] They shaved me and got me ready for the operation and got up there and Dr. Dillehunt laid me flat on my stomach, and that is the last I know.

(Testimony of James Ralph Hunt.)

(Second Supplemental T. P. 3 Line 1 to S. S. T. P. 9 Line 25)

Q. What next did you know?

A. And the next thing I knew was about two days later before I was conscious enough to know what was taking place, and I woke up with a—the first thing I noticed was a dull pain right down in my back, and I felt I was just as stiff as a board. I couldn't move anything but my head and my arms, and I could wiggle the end of my toes. Well, as soon as I began to notice things I noticed I was quite high up in the air, because I was in a two-bed room and the bed next to me looked like it was practically three or four feet below my bed, and I found that I was up on an iron frame resting on blocks of wood on top of the original hospital bed, and over this frame there was canvas stretched, and on top of that canvas there was boards laying and then I was resting on top of this, and I was bound tight, I couldn't move anything, just my toes and my head and my arms, and it was about the third day when I noticed all this.

Q. Can you state what happened and how it affected you and how you felt from then on?

A. Well, from then on for the first day—later I heard the first day that I didn't regain consciousness enough, that they fed me through intravenous and the nurse would feed

(Testimony of James Ralph Hunt.)

me every day. I couldn't move anything with this constant pain in my back, and they serviced me in every way. The nurse would feed me and bathe me and at times, why I would just lay there and sort of drift off; I didn't have any memory of anything.

Q. Did you have the brace on then?

A. No, there was no brace on me at the time. Around my body—around the incision there was regular packing and tape, and then around this was large adhesive tape over these bandages, and then they had me wrapped in a large canvas wrapper, and this thing was tied to me with strings and also large safety pins. This wrapper or binder extended from my hips up under my arm-pits.

Q. Was that binder tight or loose?

A. That binder was just as tight as they could pull it.

Q. And was there any way of maintaining you on the bed?

A. Well, the only way they could keep me on the bed was they had me fastened down with the sheets to the bed in a straight position flat on my back. There was no movement at all, either sideways or in any other position.

Q. Did you attempt to move at that time?

[62]

(Testimony of James Ralph Hunt.)

A. No, I couldn't move. I didn't have any feeling at all in my body. It was numb; like I say, all I could wiggle was my toes, turn my head and lift my arms, and I laid there on this rack for, well, practically three weeks. During that time I never moved an inch, and after three weeks' time, why the nurses—the doctor came in one morning and gave the nurse permission to slip pillows back under one side of me to sort of lift that off of the bed to ease the pain, and so that continued for two or three days. They would put it on one side and then they would put the pillows on the other side, and this lessened the pain quite a bit. It took some of the soreness out of my back, and at the end of the fourth week, why Dr. Dillehunt came down one morning and said he was taking me back to the surgery, and they rolled me up to the surgery that morning. He took off all this wrapping and the bandaging and told me he was going to put me in a cast. Well, when he got into his work and inspected the operation, there seemed to be some sort of an arthritic condition there and he told me that he couldn't put me into a cast. He put me back into this binder and took me back downstairs. They placed me back on the frame and then I laid on that frame for another two weeks, during that time moving just as the nurses would pry my body up and put pillows underneath

(Testimony of James Ralph Hunt.)

me, and the pain never lessened, it was the same all the time; it was a constant dull pain down in my back.

Q. How long did you stay in the hospital?

A. I was in the hospital practically six or seven weeks.

Q. Well, what if anything was done toward getting you out of there, if you know?

A. Well, toward getting me out of there, just the usual procedure of taking care of me. The doctors finally, after the fourth week, they took me off of this frame and put me into a bed, and this bed was in a sort of an inclining position, and they had boards under this bed and I would lay there on these mattresses, on the mattress which was on top of the boards, and I still had this binder around me, my body was stiff, and I just lay there with nothing but my thoughts about the condition I was in and how I felt and wondering if I would ever walk again, and the doctors didn't seem to give you —they wouldn't give you much hope on how you was feeling or how you were going to come out of it. You just laid there and think——

Q. What effect did that have on you in your mind?

A. Well, I wondered about my family; I had a wife and a young baby and I was wondering if I was going to be able to support them again, and also I thought of my baseball future,

(Testimony of James Ralph Hunt.)

I knew that was gone. I thought so, anyway. I couldn't——

Mr. Powers: I don't think that is proper, your [63] Honor. He can tell what happened to him but what he was speculating about at that time—the question is what are the facts, what did occur and what the result was obtaining there. I don't think it helps the jury, what he was wondering about. The question is how he got along and whether he got a good operation and a good result.

The Court: I think it is proper under the allegation of mental anguish. Go ahead.

Mr. Rauch: Q. Go ahead, the Judge said.

A. Well, these thoughts would naturally go through your mind, and I would lay there and think of that from day to day. That is all I had to think of in my condition, and count the flies on the ceiling, was just to lay there and think of these things. So after about a week on this bed the nurse came in one morning—rather, the doctor told me the day before, "Tomorrow", he says, "we are going to try and see if you can walk." Well, in the meantime the doctor's man had come from his office and measured me for a new brace, and this new type, they brought it around on the day that I was supposed to walk, and he got me into position and put this brace on me. This brace consisted of a big iron band

(Testimony of James Ralph Hunt.)

right around my hips, and there was two iron bars ran up the sides of it, and on top of this brace there were stirrups and they held you under the arms and just kept you just like this in a straight, rigid position, and from the bottom of the brace there was rubber tubes that ran down through your crotch and held this brace in place. Well, they put that on me that morning and the nurse set me up on the edge of the bed and the whole room just went blank, everything went around and around, and she kept me there for a few minutes and I realized that I couldn't get my sense of equilibrium, so they laid me back on the bed and said, "You can try it the next day". Well, the next day they came in and tried the same thing. Well, they continued that for a few days and about the third day things got so they cleared up and I sat up. Then two nurses held me on each side and held me up off the bed and put my feet on the floor. Well, I didn't have any strength and I couldn't move my legs, there was that needle-like feeling going up through your limbs, and so she put me back in bed again and the next day they tried it. Well, after three or four more days of that procedure I finally got so with the help of two nurses they could walk me down the hall.

(Testimony of James Ralph Hunt.)

Q. What was the effect on you of that effort to walk, besides the tingling feeling, if any?

A. I didn't hear you, Mr. Rauch.

Q. What was the effect on you, that first attempt to walk, besides the tingling feeling in your legs, if anything? [64]

A. Well, my legs not only tingled, but I didn't have any strength in my legs, they just crumpled up, and if the nurses hadn't held me I would have fallen, and also right up through my back there was just a stiff feeling, I felt just like it was just solid just like that (demonstrating). I couldn't move at all. Without the help of these nurses I couldn't have stayed on my feet.

Q. Did it affect your head in any way?

A. Well, there was that dizzy, reeling feeling that you get when they take you out of bed. Every morning I had that. As soon as they put me on my feet, why the room would go round and round for a while and then it would just sort of clear up.

Q. Well, did they continue that treatment?

A. They continued that treatment and tried to exercise me until practically after two weeks of this I got so I could walk up and down the hall.

Q. And then what happened?

A. Then the doctor gave permission for them to take me home, and instructed me to re-

(Testimony of James Ralph Hunt.)

main in this brace, wear the brace at all times. Well, the first day they took me home I returned to my father's place and they put me right in bed. The wife had to fix in the same manner my hospital cot had been with boards under the mattress, and they put me to bed with this brace on. Well, the sudden change from the hospital to home, everything irritated me, the children running around there and the noise and things and I was irritable and restless for quite a while, and I would get up and maybe in a day I would exercise for a half hour to an hour. The wife would walk me around the house and exercise me and wait on me all the time. She would dress me and take care of all my wants, and I did that for quite a few days until I got strength enough so that I could stay up from an hour to two hours, and just rested around the house.

Q. Go ahead. What happened after that?

A. Well, this continued until the doctor finally gave me permission to leave the house and to go out and walk around the streets, and I would do that for three or four hours a day, and during this time, why I would go down to Dr. Dillehunt's office and he would turn me over to his nurse, who would exercise me, bend my legs and put heat and light treatments on my back, and I continued with these treatments

(Testimony of James Ralph Hunt.)

up until the latter part of July, at which time Dr. Dillehunt told me to return to work. [65]

(T. P. 41 Line 17 to P. 43 Line 22) R. Hunt

Well, when I went into the partnership it was understood that I would do the selling of the station and no heavy work. I was not to change tires or to strain myself in any way, and I went into the partnership with that understanding, and I continued to work with him until the first of—practically the first of February in 1938, at which time the Union Oil Company took the station back.

Q. Well, was there part of the work you could do?

A. There was part of the work I could do, anything on the hoist that was raised up so I could stand up and work on it; I could grease cars and I could squat down beside a car and put air in tires, and I could always put gas in cars and wash windshields, and if anyone would come in and buy anything, why I could stand there and talk to them and do most of the selling.

Q. Could you bend down from your hips?

A. I had no movement from my hips to speak of at all.

Q. Will you please stand. Now, do you get out of your chair any differently than you did before that operation or before the first injury?

(Testimony of James Ralph Hunt.)

A. Yes, I do.

Q. How?

A. When I sit down now I've got to brace myself and ease myself down into the chair.

Q. Do you use your arms, or not?

A. I use my arms and lower myself into the chair. Prior to this, why I could just get up like the average person does.

Q. And now will you please stand again. Now, suppose you want to pick something off of the floor?

A. Well, if I want to pick something off of the floor I've got to get alongside of it and bend down in this manner here (indicating) and pick it up.

Q. Will you please face the jury and show them just how far you can bend forward.

A. That is as far forward as I can bend (demonstrating).

Q. Now will you show them how far you can bend backward.

A. I can bend backward just like that, is as far as I can go backward (demonstrating).

Q. Has that been the condition since you were operated on? [66]

A. That has been the condition since I was operated on.

Q. You may sit down. Do you have any sense of pain different than you had before the operation or before the injury?

A. Well now, heavy—changes in weather,

(Testimony of James Ralph Hunt.)

sudden changes in weather just stiffen my back just like a board. If they open this window and if the cold air rushes in, or as the weather changes suddenly, if it is cold or if it is going to rain, why there is a stiffness or soreness in my back and it just gets stiff.

Q. State whether or not there is any pain in change of weather.

A. There is pain then in the lower part of my body, there is a constant pain.

Q. Can you state whether or not this has any effect on your work that you do?

A. Well, in the work I do I am limited, I can't strain myself, and if I am on my feet too much or if I work too long I become nervous and irritable.

Cross Examination

(T. P. 55 Line 14 to Line 18)

Q. Yes. Wouldn't you? Didn't you change a tire there and take it off?

A. I would change a tire—I would take the wheel off the car, but I wouldn't change the tire. I wouldn't take the tire off the rim, no sir.

* * * * * * *

Cross Examination

(T. P. 56 Line 25 to P. 57 Line 19)

Q. Well now, that work that you do for the American Tobacco Company, that requires you to sit around in a truck and drive a truck all over the country, doesn't it?

(Testimony of James Ralph Hunt.)

A. No, it does not.

Q. Well, just what do you have to do there, will you tell the jury, please?

A. In my work for the American Tobacco Company I am in special sales promotion work, and the company furnishes me with a car and I drive—I never drive over maybe a period of a mile or two miles at a time, and then get out and call on stores that are in that vicinity and get in and drive to the next store. That is all the driving I do, all the sitting I do, and in between times I walk into these stores; I carry about five cartons of cigarettes along with me, a carton of sample cigarettes, and go into the store and give the dealers quality talks on our merchandise and suggest new ways for them to display their merchandise and increase their sales, and try to introduce a new brand if we have a new brand at the time, try to introduce this brand and then talk to the consumers in the store, which indirect selling is the only means of promoting the sale of tobacco. [67]

(T. P. 59 Line 25 to P. 60 Line 4) R. Hunt

A. Well, during the winter time while I was working in the service station I usually lost two or three weeks, sometimes a month, during the cold weather.

Q. You got your pay all the time?

A. Well, certainly I did, I was a partner in the business.

(Testimony of James Ralph Hunt.)

(T. P. 60 Line 8 to Line 19)

Q. You never lost any pay at all. Well now, your back is in good enough condition to enable you to travel around that territory in that little truck down there, isn't it?

A. Well, it is because I make it. I do the work to suit myself. If I want to make four calls a day, I make four calls; if I want to make eight calls, I make eight calls.

Q. But I mean you feel you are well enough to do that kind of work?

A. Certainly, because it doesn't requre any strain or effort.

Q. Except driving those distances?

A. Yes, and I never drive over maybe ten or twenty miles at a time.

(S. S. T. P. 23 Line 1 to P. 24 Line 8)

ERNEST H. COATS

was thereupon produced as a witness in behalf of the plaintiff, and, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rauch:

The Clerk: State your full name, please.

A. Ernest H. Coats.

The Clerk: Spell the last name.

A. C-o-a-t-s (spelling).

(Testimony of Ernest H. Coats.)

Mr. Rauch: Q. What is your business, Mr. Coats?

A. I am a part owner and operator of a service station on East Union.

Q. And what do you do at that service station?

A. We carry on a regular service station business, lubricate cars and service gas, and so on and so forth.

Q. And what do you sell there, if anything?

A. We sell gasoline and oils.

Q. What kind of gasoline? [68]

A. Richfield.

Q. How long have you been in that business?

A. At that particular location, Mr. Keith and I have been there for a year now.

Q. Did you ever work for the Union Service Stations, Incorporated, or the Union Oil Company?

A. Yes, I worked for them.

Q. Do you know when? Can you say when, about?

A. I worked for them for about five years.

Q. Do you remember what years, approximately?

A. From '31, I believe, until '36.

Q. Were you working for them in 1935?

A. Yes, sir.

(Testimony of Ernest H. Coats.)

Q. Do you know the Plaintiff, Mr. Ralph Hunt? A. I do.

* * * * * * *

(S. S. T. P. 32 Line 6 to P. 33 Line 3) Coats

Q. Now, that was between the dates of June, 1934, and November, 1934?

A. Yes, as close as I can figure it.

Q. Now I want to ask you if during that period of time you knew whether or not there was a jack at the station?

A. There was, yes.

Q. And can you state whether or not it was this jack?

A. It couldn't have been—it might have been this jack, but there is new parts on it, sir.

Q. Well, what was the difference, if any, with the jack as it was at that time and this one as you see it?

A. May I show you?

Q. Yes, step down and look at it.

A. Well, the jack that was over there at that time, on these little——

Q. Push it out this way so the jury may all see it.

A. There was ends knocked off of about two, if I remember right, of these little rachets right here, the ends of them, and when it come down to those, why you would have quite a jump in that handle when you would come down on those and it would drop down to maybe

(Testimony of Ernest H. Coats.)

the third one here, and when it did it would jerk this handle and it would be very unpleasant as [69] to handling it, and for that reason we stayed away from it as much as possible. We didn't use this as much as we could because there was two of these ends knocked off.

* * * * * * *

(S. S. T. P. 35 Line 6 to P. 36 Line 4)

Q. Did you ever have any further dealings at Fargo and Union other than this intermittent dealing while you were at Station 425 at 13th and Broadway?

A. Well, I was manager of it during the fall of '35 until it was leased out.

Q. As manager did you have anything to do with that defective jack that you described?

A. Why, yes. At that time Mr. McGrath was assisting Mr. Russell, or whoever the supervisor was then, and when I was made manager of it I immediately—I was a friend of Mr. McGrath's and I immediately called him and asked him to get me a jack that was—that I could use, one that would be safe, so it wasn't very long before he came over with a jack on the side of a running board of a car with the handle of it thrown over the fender, and he dropped that jack off to me. He gave me that jack, and took the one that was there away, and that is the last I have seen of it.

(Testimony of Ernest H. Coats.)

Q. That was the last you have seen of it. How long were you at 35?

A. Pardon, sir?

Q. How long were you at 73, or Union and Fargo?

A. I was there until it was leased out to Mr. Koch in the—it was in the spring of '36.

Q. During that length of time did that—was that jack ever returned while you were there which was sent away defective?

A. Not while I was there, no.

(S. S. T. P. 63 Line 18 to P. 64 Line 18)

EVERETT L. KEITH

was thereupon produced as a witness in behalf of the plaintiff and, after having been first duly sworn, was examined and testified as follows:

Direct Examination

by Mr. Rauch:

The Clerk: State your full name, please.

A. Everett L. Keith.

The Clerk: K-e-i-t-h (spelling)?

A. Right.

Mr. Rauch: Q. Mr. Everett L. Keith?

A. (The witness nods his head.)

Q. What is your business, Mr. Keith?

A. Service station operator.

Q. Service station operator?

(Testimony of Everett L. Keith.)

A. Yes, sir.

Q. Are you acquainted with Mr. Coats, who has just testified? A. Yes, sir.

Q. What if anything do you have to do with him? A. How is that?

Q. What if anything do you have to do now with him? A. We are partners.

Q. You are his partner?

A. (The witness nods his head.)

Q. And what do you—what kind of a station do you operate? A. Richfield.

* * * * * * *

(S. S. T. P. 65 Line 3 to P. 73 Line 7)

Q. The east side of the river. Now, are you acquainted with Mr. Hunt?

A. Yes, sir.

Q. And that is the plaintiff in this case?

A. (The witness nods his head.)

Q. Have you worked for Union Service Stations, Incorporated, or the Union Oil Company? A. Yes, sir.

Q. Do you know whether you were working for them in the year 1934? A. Yes, sir.

Q. Do you know where you were working?

A. At Service Station Number 65 at Union and Oregon.

Q. 65 at Union and Oregon?

A. Yes, sir.

Q. Do you remember being at that station and working there in the fall of '34?

A. '34, yes, sir. [71]

(Testimony of Everett L. Keith.)

Q. And do you remember seeing Mr. Hunt at your station in the fall of '35?

A. '34.

Q. '34? A. Yes, sir.

Q. In the fall of '34? A. Yes, sir.

Q. And do you remember what time of the year it was, what time of the fall?

A. It was along in the fall of the year.

Q. Do you know whether it was early or late fall

A. Well, it was a little bit late in the fall because it was cold, I know, and raining.

Q. Cold and raining? A. Yes, sir.

Q. And you saw Mr. Hunt at your station when it was cold and raining in the late fall of '34?

A. (The witness nods his head.)

Q. Can you state what happened?

A. Yes. He drove in there in his car and asked me if I would go over and change a tire for him, and he said the car had—he had jacked it up and it had fell off onto him and hurt his back and he wanted to know if I would go over there, and he seemed to be in pain there, and his face was white and everything, so I told him sure, I would go over and change the tire, so I went over there and the car was right just as he had left it there, the jack was still laying underneath the car, and I jacked the car up——

(Testimony of Everett L. Keith.)

Q. Now, just where was it?

A. It was on First and Multnomah Street.

Q. First and Multnomah. Have you checked that so you are sure about that?

A. Yes, sir.

Q. And when did you last check that location? A. This afternoon.

Q. This afternoon?

A. It was practically about noon.

Q. About noon, and do you know whether or not there [72] is any building at that location?

A. Yes, there is an apartment house there.

Q. Do you know the name of it?

A. Why, I don't recall it right now.

Q. Do you know what it looks like?

A. Yes, it is a red brick building.

Q. A brick building. Well now, can you state just where the car was when you arrived with Mr. Hunt? In the first place, what was Mr. Hunt's condition when he came to the service station?

A. Well, he seemed to be hurt all right, he seemed to be in pain. I know he couldn't hardly get out from underneath the wheel to let me drive it over there. I drove the car back over to where the tire was at that he wanted changed.

Q. What was his condition that made you think he was in pain?

(Testimony of Everett L. Keith.)

A. Why, he was nervous and his face was white. I didn't want to go either because it was cold and rainy.

Q. Well, did he drive his car?

A. No, I drove the car.

Q. Do you know why?

A. Because he couldn't hardly drive it.

Q. He couldn't hardly drive it, you say?

A. Yes.

Q. And now when you got back to this apartment house at Multnomah and First Street, can you state just where the car was and what kind of a car it was, first?

A. It was a '30 or a '31 Plymouth coupe.

Q. Can you state now just where that car was, what its position was in the street?

A. It was parked on the wrong side of the street with the wheels, front wheels, cramped in towards the curb.

Q. Is that street level or does it slope there?

A. No, it slopes to the west.

Q. And which way was the car facing?

A. Towards the west.

Q. And with the front which way? [73]

A. West.

Q. And what part of that car was against the curb, if any? A. The left front wheel.

Q. The left front wheel. And can you state whether or not the car was in a position that it could move itself?

(Testimony of Everett L. Keith.)

A. No, it couldn't because the curb stopped it from rolling ahead, and it couldn't roll back uphill.

Q. It was uphill, back? A. Back, yes.

Q. And the curb was in front of it?

A. Yes.

Q. Now, you said, did you, that you saw a jack there?

A. Yes, the jack was laying underneath the car there right where it had fallen off of there.

Q. What kind of a jack was it?

A. It was an old Ford jack.

Q. And do you know what kind of a handle a Ford jack has, or that had?

A. It had a little short handle about that long (indicating).

Q. And was there anything other than that that you noticed about the car? Was it in good condition to run?

A. Yes, the car would run all right, I guess.

Q. Did it have anything the matter with it that required your attention or Mr. Hunt's?

A. Why, the right rear tire was flat on it.

Q. And do you know the shape of that car? You say it was a '30 or '31 Plymouth coupe?

A. (The witness nods his head.)

Q. Can you state what its shape is with respect to the rear of the car from the axle back? What is the shape of it?

(Testimony of Everett L. Keith.)

A. They have quite an overhang on the Plymouths. They are built rather low to the ground, and this one had a trunk rack on the back of it.

Q. It had a trunk rack in back? [74]

A. Yes, sir.

Q. Can you state what the structure of the car is as far as distance from the axle to the rear of it is concerned?

A. You mean to state the distance from the axle to the back of the car?

Q. Yes.

A. Oh, approximately four feet.

Q. Approximately four feet. Well now, what did you do when you got there?

A. Well, I took off my raincoat and laid it on the ground and crawled underneath there and jacked it up again with the same jack.

Q. Will you state why you crawled under it?

A. Because you couldn't walk under it.

Q. Well, why did you go under it?

A. To jack up the car.

Q. To jack the car up. Could you jack it up from outside any way other than to crawl under it?

A. Not with that jack, no. If the jack for the car had been there like it is supposed to be used on that car you could have jacked it up from the outside, but there was no other jack there.

(Testimony of Everett L. Keith.)

Q. What kind of jacks were supposed to be used on that car?

A. It is supposed to be a screw type jack that you could insert a handle in and push it back underneath there and stand on the outside and wind the car up without crawling underneath it.

Q. Do you know what form of jack was used generally in the community at that time with that type of car?

A. A screw type jack.

Q. Screw type jack. Well now, will you describe to the jury the difference between the screw type jack and the actual jack which was used to raise that car?

A. The Ford jack that they had there, you had a handle approximately so long that you would push down this handle and every time it would go down you would raise it a notch. With a screw type jack for that car it is supposed to be a screw so that you could push a handle into the jack and slide the jack under the car and stand back from under the car and turn the crank and raise your car up.

Q. Now, can you state which was the higher jack? [75] A. State which?

Q. Which was the tallest jack, standing on the ground?

A. The Ford jack that he had.

(Testimony of Everett L. Keith.)

Q. What was the difference in their height, can you show?

A. Oh, a Ford jack is approximately that tall and these little jacks that are supposed to come with the car are only about that tall (indicating).

Q. Do you know whether or not there was any provision on the screw type jack to keep it from slipping from under a car?

A. Yes. On top of the screw type jack there is four little prongs there that catch the axle to keep it from slipping off.

Q. Was there any such thing as that on the top of the Ford jack? A. No.

Q. Well, then when you arrived just what did you do besides jacking the car up?

A. I took the flat tire off and put the spare tire on, put the flat tire in the back of Mr. Hunt's car and drove Mr. Hunt up to his station.

Q. What station was that?

A. Union and Fargo, Number 73.

Q. And then can you state what happened then? A. Mr. Timmer brought me home.

Q. Mr. Timmer brought you home?

A. Yes.

Q. Was anything said at that time as to what had happened?

(Testimony of Everett L. Keith.)

A. When we drove in there they wanted to know what was the matter and he told him the car had fell off the jack and hurt his back, so they sent him on home then.

Q. Who stated that? A. Mr. Hunt.

Q. In your presence? A. Yes.

Q. To whom did he state it?

A. Mr. Timmer.

Q. Mr. Timmer? [76] A. Yes.

Q. And what was Mr. Timmer's position there? A. Manager.

Q. Manager of that station?

A. (The witness nods his head.)

Q. And the station was where?

A. Union and Fargo.

* * * * * * *

(S. S. T. P. 77, Line 23, to P. 78, Line 17.)

Q. Just a minute, please, Mr. Keith. When that jack that you speak of was used on a Ford, can you state whether or not a man had to crawl under the Ford to raise it?

A. Not on a Ford he wouldn't have to, no.

Q. Can you state the difference between that type car for which it was made and the one which Mr. Hunt attempted to use it on?

Mr. Powers: They have been all over this, your Honor.

The Court: Go ahead, answer the question.

(Testimony of Everett L. Keith.)

A. The type of jack that was used on the car there was for a Ford where you could jack up a Ford without getting underneath the car, but with this particular car you should have had a jack with a handle on it about four feet long to raise it without getting under the car.

Mr. Rauch: Q. And I believe you told Mr. Powers that Mr. Hunt told Mr. Timmer that a car had fallen off the jack. Do you know whether he said anything about his back at that time? Did Mr. Hunt tell him anything about the car hitting him?

A. Yes, he said that the car fell off from the jack and hit his back, hurt his back, and he went over to get me to fix the—put the tire on for him.

JAMES RALPH HUNT

(T. P. 131, Line 2, to P. 134, Line 8.)

Redirect Examination

A. The little jack I used was not all right. As far as I knew it was all right, I had been using it on other cars and it worked right along, yes.

Q. It worked all right for cars of the age and vintage that it was made?

A. Yes, it was.

(Testimony of James Ralph Hunt.)

(An objection was here interposed.)

Mr. Rauch: Q. Will you state for what particular car, if you know, that jack was made?

A. Well, the jack was made for a Model A Ford. It [77] came as equipment in my car.

Q. Can you state whether that was a high clearance or a low clearance car?

A. It had a high clearance in the rear end.

Q. Can you state whether that was a higher clearance or a lower clearance than the Plymouth which fell on you?

A. The Ford was a higher clearance than the Plymouth.

Q. Now, when you went under that car to place this jack, do you know how much space you had between the surface of the street and the lower parts of that car to get under it?

Mr. Powers: He went all over this, your Honor.

The Court: Well, I am not sure, this examination has taken so long, whether he has been over it or not. Go ahead and answer the question.

A. Well, when there was a flat tire there was practically ten inches clearance between the axle and the ground.

Mr. Rauch: Q. Now, do you know the structure of that Plymouth car well enough to know whether or not in dropping say two or three

(Testimony of James Ralph Hunt.)

inches the springs would let it go lower than it was when you found it and crawled under it?

A. Well, if it dropped down on a flat tire the rear end would drop three to four inches.

Q. By the action of the springs?

A. By the action of the springs.

Q. Now, it was spoken here about a long handle. Would a long handle have added to that jack that you used, that Ford jack, have helped the situation any?

A. No, it wouldnt' have. It wouldn't have worked at all.

Q. You couldn't have used it at all?

A. No, sir.

Q. Why?

A. Well, you take a long handled jack, there wouldn't have been clearance enough in the rear end to have got it to catch either way, to go up or down.

(An objection was here interposed; objection overruled.)

Mr. Rauch: Q. Then will you state whether a simple longer handle was required to make a safe tool or an [78] entirely different jack?

(An objection was here interposed; objection overruled.)

A. What I should have had is a telescope jack with a screw type action on it. You should

(Testimony of James Ralph Hunt.)

have had an extension handle that extended on beyond the end of the car and that fitted into this jack, and you could have screwed the jack up. You could have stood out at the rear end of the car and turned the jack and raised the car up.

Mr. Rauch: Q. Now, I want to ask you why it was you didn't take the big jack out?

A. Well, the big jack was too heavy. It required two men to lift that jack.

(An objection was here interposed; objection sustained.)

Mr. Rauch: Q. All right, I will ask this; something was said about an able bodied assistant. State whether or not if you had had one you could have taken the large jack.

A. Yes, I could have.

(An objection was here interposed; objection overruled.)

A. If I had had an assistant he could have lifted the jack in and out of the car.

Mr. Rauch: Q. Now, you stated this morning that this particular jack which was exhibited was not the jack, the large jack, which was about the station at that time. Can you state what, if any, actual difference there was in the structure of the jack that was there and this one, if you know?

(Testimony of James Ralph Hunt.)

A. Well, the jack that was at the station at that time, the teeth and the ratchet effect on one end of the teeth was sheared off, and the spring handle, when you would work the spring handle it would stick. I don't know how this one works. The other one wouldn't release properly. You would squeeze that and it wouldn't give. You would have to shake the jack to get it to release.

Q. What was the effect on one using it?

A. Well, when you shook that thing it jarred you and all at once it let go and this handle would fly up and you would have to hang on to lower it down.

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(T. P. 138, Line 11, to P. 139, Line 12.) (R. Hunt.)

Q. You say if there had been an able bodied assistant there he could have lifted the jack in, the regular jack there at the station, and you could have taken it with you?

A. Yes, sir. [79]

Q. Mr. Snell was there, of course?

A. That is right.

Q. Did you ask him to lift it in?

A. I didn't ask him to lift that jack in, no.

Q. No. What kind of a jack did they furnish with those Plymouths when the car was put out, do you know?

(Testimony of James Ralph Hunt.)

A. Well, offhand I don't know. I believe it is a screw type jack.

Q. As I understood you to say that the reason that you had to get under there was because of your back, you couldn't bend around and reach under to reach it and you had to crawl under because of the condition you were in.

A. You couldn't have reached around under the Plymouth anyway.

Q. It wouldn't have made any difference then about your back?

A. My back hadn't——

Q. Anyone would have had to crawl under it, is that correct?

A. That is right, they'd have had to crawl under it.

Q. It wouldn't have made any difference?

A. No.

Q. Unless they had used the jack that was out at the station, then you couldn't crawl under it and use it?

A. You'd have shoved it under.

Q. Just shove it under and you wouldn't have got under it at all?

A. That is right.

* * * * * * *

(Testimony of James Ralph Hunt.)

(T. P. 140, Line 21, to P. 141, Line 2.) (R. Hunt.)

Q. Had Mr. Snell gone and helped you in with the jack after he had refused to go to this place where the tire was to be fixed and you had gone, how would you have gotten the jack out of the car?

A. I couldn't have gotten the jack out of the car. If he had lifted that jack up into the rumble seat of my car I would never have gotten it out. [80]

Plaintiff testified that when the car slipped off the jack it came down striking him in the back in the same region of his back sprain, that he was again momentarily paralyzed in his legs and he was unable to go on with his work although he did drive his car a few blocks down to the closest Union Service Station, where an employee from that station drove plaintiff back to where the tire was being changed from the car, the other employee changed the tire and then drove plaintiff back to his own station. From there plaintiff went home. Shortly thereafter, and on the same day, plaintiff was taken by his wife to Dr. Dillehunt's office. Dr. Dillehunt recommended a fusion operation of the lower vertebrae of the spine. Some three months thereafter, the plaintiff, together with Mr. Russell, his superior who then was district manager of the

(Testimony of James Ralph Hunt.)

Union Oil Company in Portland, called at the Hartford Accident and Indemnity Company's claim office in the Lewis Building in Portland, Oregon, where they talked with the insurance company's claims adjuster, Harry G. Hadfield. The claims adjuster was already acquainted with plaintiff's prior accident of June 11, 1934, and plaintiff informed the claims adjuster of his second accident of November 5, 1934, telling him that a car had slipped off a jack striking him on the back, that he had gone to Dr. Dillehunt and Dr. Dillehunt had recommended a fusion operation of his spine. Plaintiff inquired whether the insurance company would take care of the matter. The claims adjuster for the insurance company said that the insurance company would pay for the operation and pay plaintiff's other medical and hospital expenses and pay the plaintiff compensation at the same rate as prescribed under the State Workmens Compensation Act. Plaintiff then went to the hospital on February 28, 1935, and a fusion operation on his spine was performed by the said Dr. Dillehunt. Plaintiff was in the hospital from February 28, 1935, [81] until April 20, 1935, and was convalescing from the time he was discharged from the hospital until June 24, 1935, at which time he was discharged by Dr. Dillehunt as completely cured and able to return to work and at that time plaintiff went back to work at a filling station of the defendant. He

(Testimony of James Ralph Hunt.)

was given light work for the first few weeks and then reassumed his regular work. Plaintiff after the operation was able to discard his back brace and has never had to wear it since his operation. Plaintiff continued working as a service station attendant for the defendant and at the same station where he testified he was working when the accident occurred which brought on his back trouble. Plaintiff continued on at this same service station after he left the employ of the defendant, this service station having been leased by the plaintiff and another from the defendant and they continued operating it until about February 1, 1938, at which time plaintiff discontinued his employment at the service station and entered the employ of the American Tobacco Company, where he has been working ever since. His work for the American Tobacco Company is that of salesman. He drives a light delivery truck covering a territory out of Chico, California. At the time plaintiff went to the hospital for his operation until he returned to work several months later, he was dropped from the payroll of the Union Oil Company. During this period he received compensation payments from the Hartford Accident and Indemnity Company about every two weeks. The amount of his compensation payments was the same as prescribed under the Workmens Compensation Act of the State of Oregon. The conditions on the draft and the insurance policies under which

(Testimony of James Ralph Hunt.)

these payments were made are described hereinafter under the heading of "Exhibits." The arrangement leading up to the payment of the compensation benefits by the Hartford Accident and Indemnity Company, plaintiff's [82] employer's insurance carrier, was testified to as follows:

(T. P. 98, Line 22, to P. 99, Line 10.) (R. Hunt.)

Q. And they gave you the kind of work to do around with credit cards for a while, didn't they? A. Yes, they did.

Q. And while you were working on those credit cards you actually earned more money than you had earned out there at the station?

A. I don't know why. I got the same check.

Q. Well, you didn't get the same amount, did you? Didn't you get commissions?

A. I got commissions through the sales at the station, yes.

Q. Didn't you get commissions and an allowance, mileage allowance, for your car when you used your car?

A. I was supposed to, but I never did get all those allowances that were coming to me. They paid me some expenses on my car, but they never paid all of them. [83]

(Testimony of James Ralph Hunt.)

Plaintiff testified, T. 99 to T. 101,

Cross Examination

"Q. Then you got your wages right through from July 1st, 1934, or, for that matter, in June also of 1934, the time the first accident occurred, you got your wages right through up to the time you went into the hospital?

A. Yes, sir.

Q. Then when you went into the hospital for the operation you got compensation payments? A. That is right.

Q. And you got those compensation payments during the time that you were unable to go to work, during the time you were in the hospital and the time that you were off work?

A. Yes, sir.

A. And that period ended about June 24th, 1935? A. Right.

Q. And then isn't it a fact that you were overpaid some compensation there of about twenty-three dollars? A. Yes, sir.

Q. And isn't it a fact that after you had gone back to work you received this compensation check from the insurance company that was paying it to you and then you took the check and cashed it? A. That is right.

Q. Although you had gone back to work?

A. (Witness nods his head.)

(Testimony of James Ralph Hunt.)

Q. Isn't it a fact that when that was called to your attention that you agreed to have that money repaid? A. That is right.

Q. About twenty-three dollars?

A. And it was repaid.

Q. Now, there is no dispute along in there at all about that; you got your compensation, you got your medical bills paid for you and you had gone back to work and you were getting along all right; that is a fact, isn't it?

A. Yes, sir.

Q. That had the endorsement on there, full settlement, for that compensation? [84]

Mr. Rauch: Just a minute, please. I think the checks are the best evidence, and I think that is subject to cross examination.

Mr. Powers: I think that is probably correct.

Q. But you did get that money, you say, as you went along, compensation payments?

A. Yes, sir.

Q. You had those doctor bills paid for you?

A. Yes."

(T. P. 102, Line 13 to Line 15.) (R. Hunt.)

A. As far as the operation was concerned I guess his work was all right, but I am not satisfied with the condition I am in today.

Then T. 103 to T. 106:

"A. Well, Dr. Dillehunt told me that it was a very—that it was a tough operation, he told

(Testimony of James Ralph Hunt.)

me that, and he didn't say how they would perform it or how they would do it, he just told me it would be a bad operation and he told me that I would probably be in the hospital for three or four months. Outside of that, that is about all that was said. I couldn't find anyone else that had ever had a spinal fusion.

Q. Did you know that you were going to receive compensation payments when you were in the hospital? A. Yes, sir.

Q. How did you know that?

A. Well, Mr. Russell told me that when I went to the hospital that I would go off of full salary.

Q. That you would go off of full salary?

A. Yes.

Q. And were you told that you would receive compensation payments and that the doctor bills would be paid for you?

A. Yes, sir.

Q. And you accepted those?

A. Did I accept the checks?

Q. You accepted the compensation payments and the payment of the doctor bills?

A. I accepted them, yes.

Q. You accepted those from the Hartford Accident and Indemnity Company; you knew there was a policy there, didn't you?

(Testimony of James Ralph Hunt.)

A. I surmised there must be or they wouldn't be paying it.

Q. Well, did you talk with anyone that had to do with that policy? [85]

A. The day before the operation Mr. Russell and I went down and talked to Mr. Hadfield and he asked me how much I was making a month, and he told me the percentage I would be paid every two weeks on my salary.

Q. And who was Mr. Hadfield?

A. The representative for the Hartford Accident people.

Q. The Hartford Accident and Indemnity Company? A. Yes.

Q. And they were going to pay you the compensation that you would lose, is that right?

A. Yes, sir.

Q. That payment was to be made on the same basis as you would receive from the State if your employer had been under the State?

A. Well, I didn't know what basis it would be paid on. He told me I would get fifty-three per cent of my salary.

Q. Well, was there a discussion there that that was the basis that the State Compensation fund pays?

A. I don't remember anything—if I remember right I think he said that fifty-three per

(Testimony of James Ralph Hunt.)

cent would be a little more than what I would be paid ordinarily.

Q. Under the Compensation?

A. Under Compensation.

Q. Well, wasn't that bceause they gave you credit because of the extra money you had made because of the commissions? They took that into consideration to get your salary up a little bit for you to help out in going into that operation and get you a little more money per month?

A. That is right. I was entitled to that.

Q. And you had a choice then of going in and taking those compensation payments and having the bills paid for you or else suing the Union Oil Company, isn't that so? You could do one or the other?

A. Well, I imagine so. At the time I was interested in getting well.

Q. Yes, and you thought it was better to take these compensation payments and have your bills paid than to go into a lawsuit with them?

A. I didn't think anything about that.

Q. Well, that was the proposition, wasn't it, whether you would take the compensation payments and the——

A. There was nothing—well, they told me that they would pay my salary in the form of compensation, yes. [86]

(Testimony of James Ralph Hunt.)

Q. Well, wasn't that your understanding?

A. They didn't mention anything about a lawsuit, and I didn't either.

Q. Well, wasn't it understood there that these payments would be made under that policy to you in lieu of any claim that you would have?

A. No, sir, I was never asked about that.

Q. Did you understand that they were paying you there and paying these bills and that you could still sue them for this same injury?

A. I didn't under—— there was nothing said about that. They said they would pay me compensation and there was nothing said about suing anything, and I didn't understand one way or the other.

Mr. Powers: Q. Well, you knew when you were signing and you were taking the checks they said, "Release in full" for that compensation?" * * * [87]

(S. S. T. P. 17, Line 10, to P. 18, Line 3.)

A Juror: Is there any significance to that?

Mr. Powers: No.

The Juror: Oh. That is all right, then.

The Court: Let me see the checks.

(The checks were handed to the Court.)

Mr. Powers: Now, these checks——

The Court: Mr. Powers, just a minute.

(Testimony of James Ralph Hunt.)

Mr. Powers: Yes.

The Court: I think I want to make some comment to the jury about them. Just so we keep these dates straight, gentlemen of the jury, the plaintiff now has fixed the time of the accident for which he is suing as November 5th, 1934. He testified that he hurt his back earlier in the year in June, 1934. He went to the hospital in——

Mr. Powers: February 28, '35.

The Court: In 1935. These checks run through '34 and '35 and later in the case after it is all in there may be some questions for your determination as to the place in the case of all of the dates, including the dates on the drafts.

* * * * * * *

(S. S. T. P. 21, Line 17, to P. 22, Line 13.)

The Court: I want to make this further statement to the jury, Mr. Powers.

Mr. Powers: Yes, your Honor.

The Court: That insurance policy insured the company for which the plaintiff worked up to July 1934——

Mr. Powers: July 1st, 1934, yes, your Honor.

The Court: Yes. When he was first injured, which is not the injury he is suing on here, in June of '34, he was working for the company that that policy insured, and that company is

(Testimony of James Ralph Hunt.)

not now in the case. And that insurance ran out by its terms, did it not, Mr. Powers?

Mr. Powers: Yes, your Honor.

The Court: At the end of June, 1934? [88]

(T. P. 110, Line 2, to Page 111, Line 11.)

The Court: I think I want to make some statement to the jury about them. Just so we keep these dates straight, gentlemen of the jury, the plaintiff now has fixed the time of the accident for which he is suing as November 5th, 1934. He testified that he hurt his back earlier in the year, in June, 1934. He went to the hospital in——

Mr. Powers: February 28th, '35.

The Court: In 1935. These checks run through '34 and '35, and later in the case after it is all in there may be some questions for your determination as to the place in the case of all of the dates, including the dates on the drafts.

(Mr. Powers thereupon explained Defendant's Exhibits 9 to 21, inclusive, further to the jury.)

The Court: I want to make this further statement to the jury, Mr. Powers.

Mr. Powers: Yes, your Honor.

The Court: That insurance policy insured the company for which the plaintiff worked up to July, 1934.

(Testimony of James Ralph Hunt.)

Mr. Powers: July 1st, 1934, yes, your Honor.

The Court: Yes. When he was first injured, which is not the injury he is suing on here, in June of '34, he was working for the company that that policy insured, and that company is not now in the case; and that insurance ran out by its terms, did it not, Mr. Powers?

Mr. Powers: Yes, your Honor.

The Court: At the end of June, 1934?

Mr. Powers: That is correct.

The Court: That insurance was not in force at the time when he claims he was injured later in November, the case for which he is suing here, and that insurance did not insure the employer for whom he was working in November, '35, when he claims he was injured, the injury which he claims he suffered for which he is suing here. All those things will have their place at the time of the instructions and will be dealt with by the lawyers in their arguments. [88½]

(T. 111 to T. 114):

Mr. Powers: Q. You knew that was on the back of the checks, in other words?

A. Well, when I signed the checks it stated on the back that it was for the compensation for that lost time while I was in the hospital.

Q. Yes. You were able to read? I mean you

(Testimony of James Ralph Hunt.)

could read what was on the back of the checks and you could see what was on the front of the checks, too, for that matter, couldn't you?

A. It stated on there that they were paying me for the time that I was losing every two weeks from being off work in the hospital.

Q. In other words, you were familiar with what was on the checks when you signed them?

A. I read what was on the checks.

Q. Yes. Then you were paid up to the time you went back to work and a little beyond that?

A. Yes.

Q. And when it turned up or developed that you had been paid a little beyond that, why you paid that back? A. Yes, sir.

Q. Well now, did you ever make any—when did you go down to the Hartford Office to see about getting these compensation payments and medical attention?

A. The day before I went to the hospital Mr. Russell and I went down to the Hartford office. [89]

Q. That would be about February 27th, then, I presume? A. Around there, yes.

Q. Yes, and you had some discussion there with Mr. Hadfield, you say?

A. Yes, we did.

Q. And did you tell him about the accident there in November when a car fell on you?

(Testimony of James Ralph Hunt.)

A. He wanted to know what kind of operation I was going to have and I told him that a car had fallen and hurt my back and that they were going to—Dr. Dillehunt was going to perform a fusion.

Q. Yes. So in making the arrangements there for the compensation payments and the hospital expenses, it was to cover the accident that you have been referring to in November?

A. Well, according to the arrangements, why they didn't state just what accident they was going to pay for.

Q. But I say you told him about that accident, though? A. Surely I told him.

Q. And you wanted to go to the hospital because of that and get your hospital bill paid, your doctor bills paid, and get compensation, and that is what they agreed to do, wasn't it?

A. They agreed to pay me for my time while I was out and correct the condition of my back, yes.

Q. Well, you didn't have any talk with Mr. Hadfield about your back? You had that with the doctor, didn't you?

A. Well, all he did was just what kind of operation they was going to perform, that is all that I knew.

Q. Yes, and you told him about going up to Dr. Dillehunt there in November and he said

(Testimony of James Ralph Hunt.)

that you needed an operation and you wanted to get it; that was it, was it? A. Yes, sir.

Q. So in talking with Mr. Hadfield about it you were talking about your condition at that time and everything that occurred up to that time? A. Yes.

Q. Yes. You think you told Mr. Hadfield that a car fell on you at that time?

A. I think I did. I explained what happened.

Q. Did you ever make any claim then to Mr. Hadfield—how did he get those checks to you? How did you get your checks? [90]

A. They were mailed out every two weeks.

Q. Mailed out from the Hartford?

A. From the Hartford.

Q. And they would come out there to you?

A. They went to my house to my wife, yes.

Q. Yes, and you got those all right, then you were overpaid two or three weeks and you returned that money to the Hartford?

A. Yes, sir.

Q. And that was after you had gone back to work?

A. That was after I had gone back to work.

Q. And did you ever make any further claim to the Hartford for any additional compensation of any kind?

(Testimony of James Ralph Hunt.)

A. No, I never talked to the Hartford people after I got out of the hospital."

(T. P. 115, Line 11, to P. 116, Line 3.) (R. Hunt.)

Q. Well, then when did you first decide to bring a lawsuit against the Union Oil Company?

A. Oh, it was after I left the company. I knew I couldn't do any hard work and that I was crippled for the rest of my life as far as making a living doing heavy work. I would have to do light, easy work.

Q. You decided at that time to bring a lawsuit?

A. I thought I would see what could be done about the condition of my back.

Q. Did you go back to Dr. Dillehunt?

A. No, sir. Dr. Dillehunt told me I was well, that he had done all he could do for me.

Q. Well, did he tell you you could do hard work?

A. No, he told me to do light, easy work.

Q. He didn't tell you you could do any lifting or anything like that?

A. No. He says, "If you wait long enough," he says, "maybe you can do heavy work some day." [91]

(T. P. 119, Line 2, to P. 121, Line 22.) (R. Hunt.)

Q. I am showing you, Mr. Hunt, Defendants' Exhibit 21, Pre-Trial Exhibit 11, and

(Testimony of James Ralph Hunt.)

asking you if you know when you first saw that?

A. This is the first time I have seen this.

Q. Here in the court room?

A. Right here in the court room.

Q. Were you a party to that in any way? Is your name on it? Look it over.

A. No, I wasn't a party to that as far as I knew. I made payments to the Union Oil Company for my insurance.

Q. How is that?

A. I say I made payments to the Union Oil Company for my insurance.

Q. Did anyone ever tell you that that the Hartford Insurance Company was insuring you against loss of time?

A. No, they didn't.

Q. Or for any other purpose?

A. No, sir.

Q. At the time you went down to the insurance company with Mr. Russell, did he show you that policy?

A. No, sir, I didn't see this policy.

Q. Did he refer to it to you and tell you about it? A. No.

Q. Tell you that the insurance company was going to pay you, the Hartford would?

A. He told me at that time that I would get my salary from the Hartford Accident people,

(Testimony of James Ralph Hunt.)

that I was going off of full time and onto loss time accident.

Q. Will you look on the back of that and see if there are any bills attached and receipts of payment?

A. Payments of the Union Station to the Hartford Accident Company.

Q. How is that?

A. I say there is some bills here or statements stating that the Union Service Station was paying the Hartford Accident people for this policy.

Q. That is the Union Service Station, Incorporated, paid the Hartford Accident people for that policy? [92]

A. That is right.

Q. You didn't contribute in any way?

A. No, sir.

Q. You stated today, I think, that you supposed that this money which you paid in for your compensation in case you were sick or injured——

(An objection was here interposed.)

The Court: He has not asked any question yet. Let's let him finish the question first.

Mr. Rauch: Q. I so understand that you stated that. I will give you a chance now to state whether or not you made such a statement

(Testimony of James Ralph Hunt.)

or intended to make such a statement. Don't answer now.

(An objection was here interposed.)

Mr. Rauch: I would rather state the question over, if your Honor please.

The Court: All right.

Mr. Rauch: Q. Mr. Hunt, will you state if you remember what you told Mr. Powers with respect to what you understood the two dollar payments were which were deducted from your pay check?

A. Well, I understood that the two dollars went to the Union Oil Company and in time of sickness or of an accident that they would pay our salary and our expenses while we were off.

Q. Did you state anything to Mr. Powers that you remember about an employees' fund this morning?

A. I told him that we contributed two dollars a month to the Employees' Fund.

Q. Now did you understand the money which you contributed to the Employees' Fund was to be paid to the Hartford Insurance Company for the benefit of the Union Service Stations, Incorporated?

A. No, sir, I didn't know anything about the Hartford Insurance Company until the day before my operation, when they told me that

(Testimony of James Ralph Hunt.)

they would pay my salary while I was in there. [93]

(T. P. 122, Line 5, to P. 123, Line 25.) (R. Hunt.)

Mr. Rauch: Q. Now, did I understand you to state that you did tell Mr. Hadfield when you and Mr. Russell went down to the insurance company that you had had an injury, the latter injury of November 5th, 1934?

A. Yes, I did tell him that I had been hurt.

Q. So they understood there, as far as you know? A. Yes, sir.

Q. Handing you Defendants' Exhibit 10, so marked for identification, I will ask you, please, what that is.

A. That is a compensation check for the payment of my wages from the date——

Mr. Powers: The check speaks for itself, now, for the dates stated on here.

Mr. Rauch: Q. Now, will you please turn over on the back and will you read again for me what is on there?

Mr. Powers: Well, the same objection, your Honor. It speaks for itself.

The Court: Well, he can read it, Mr. Powers. You read, so he can read it.

A. It says, "The endorsement of this draft by the payee constitutes a clear release and receipt in full settlement of the claim stated on the other side."

(Testimony of James Ralph Hunt.)

Mr. Rauch: Q. Now, for what period of time is the account on the other side? What period of time were you paid?

A. It is paid from the second 25th to the third——

Q. From what, again?

A. From the second month, 25th day.

Q. That is February 25th?

A. February the 25th to March the 15th.

Q. And is it marked so as to show what it was paid for?

A. It says—I don't see where it states what it is paid for. It is the date of accident, paid by the Union Oil Company.

Q. I don't want to ask you to read; I want to ask you, can you state if you knew at that time for what that check was made?

A. That check was made for my salary from those dates, to pay my share——

Q. What are the dates again, please? [94]

A. From February the 25th to March the 15th.

Q. And will you again refer to the back where it says, "On account stated on the other side" and then will you turn over again and see if it states for what accident that loss of time was paid as on account?

A. It states that this was paid for the accident on the eleventh month, 5th day, 1934.

(Testimony of James Ralph Hunt.)

Q. What day was that?

A. That was the 5th day of November, the date of my last accident. [95]

(T. P. 124, Line 7, to P. 125, Line 25.) (R. Hunt.)

Mr. Rauch: Q. Now, I will ask you to look at Defendants' Exhibit 11 and see if you can state from that for what purpose that check was paid.

A. This was paid for compensation from the 16th day of March, it says, "inclusive," that is all it says, "Inc."

Q. From what?

A. It states it was paid—it says, "Compensation 3/16 to the 30th" of that month.

Q. That is, from March 16th to March 30th?

A. To March 30th.

Q. Does it state on account of what cause that is paid?

A. No, it does not state here on what cause.

Q. Will you look at the same place where you found the date 11/5/34 and see what the mark is on that, what the date or mark is on that. A. The date is 6/11/34.

Q. How is that put on there?

A. It is in pen.

Q. What is the typewritten amount?

A. The typewritten amount is 11/5/34, and it is scratched out.

(Testimony of James Ralph Hunt.)

Q. From whom did you receive those checks?

A. I received these checks from the Hartford Accident people.

Q. Did they come to you through the mail?

A. Yes, they did.

Q. Was there any communication accompanying them?

A. There was a receipt came with them.

Q. How is that?

A. I say there was a form came with them stating what I was receiving the check for.

Q. Did they give you any letter at that time?

A. No letter other than telling just what the check was for and the date it was for.

Q. Did it state—I will ask you if you can tell me [96] what these papers are.

A. These are the letters that came with the checks.

Q. Whose signature is on there?

A. Harry G. Hadfield.

Q. Is that the signature on the letter that bore the check? A. Yes, it is.

Q. Have you seen that signature often enough to know whose it is?

A. Yes, sir.

Q. And whose is it?

(Testimony of James Ralph Hunt.)

A. It is the agent for the Hartford Accident people. [97]

Then T. 189 to 191:

"Q. The compensation payments that you thought you were receiving there, Mr. Hunt, were they figured out down in Mr. Hadfield's office that day, the percentage you would get of your wages?

A. The compensation checks, they figured out it would be approximately fifty-three per cent.

Q. And that corresponded with the Industrial Accident Commission of the State?

A. I think so.

Q. And you told Mr. Hadfield about your trouble there in November, too, about your back? It had come back on you anyway, or you were going to have to have an operation after that November episode, or something to that effect, did you?

A. Mr. Russell explained to Mr. Hadfield that it was necessary for me to have an operation, and when I got down there he asked me about my back, and what had happened, and I told him just what had happened, and all he did was to tell me what percentage I would get of my salary. He asked me approximately how much I was making a month.

(Testimony of James Ralph Hunt.)

Q. And then did he say he would pay the doctor bill?

A. He said the doctor bill and hospital bill was taken care of.

Q. He would pay those, and then you received those and you got these letters about compensation payments that you have here, I mean the enclosures that have been introduced in evidence? A. Yes.

Q. You got a few others too, I believe, later on. Have you got those originals with you, other transmittal letters?

Mr. Rauch: I have them here if you care to see them.

Mr. Powers: Q. Well, I will just ask you briefly to save time, some of them refer to one date of the accident and some to the other, is that correct? A. Yes." * * *

"Mr. Powers: Q. You got paid from Maccabees ten dollars a week, too, I think you said?

A. Yes, sir.

Q. And then besides that you got the compensation from the Hartford?

A. Yes, sir." * * * [98]

(T. P. 191, Line 7, to Line 10.) (R. Hunt.)

Q. Did you pay the Maccabee the premium for that insurance that you got?

(Testimony of James Ralph Hunt.)

A. Yes, sir, I paid Maccabee seventy-five cents a month for that small premium that paid ten dollars a week for fifteen weeks.

The insurance company adjuster testified that the compensation payments were made to the plaintiff partly under one policy and partly under another, that he first started paying under the policy, Exhibit 27, which covered the Union Oil Company, and then switched the claim and made payments under policy, Exhibit 26, which was issued to Union Service Stations, Inc., saying that the reason for this was that Dr. Dillehunt after the first two compensation payments had started, had informed him that the injury was a recurrence of the June 11th sprain.

MR. HARRY G. HADFIELD,

called as a witness for the defendant, testified (T. 169 to 181):

"Q. Now, with respect to the Hunt accident, there were certain payments that were made, compensation payments, in the form of drafts to Mr. Hunt and also to Dr. Dillehunt and the hospital? A. Yes, sir.

Q. Can you tell us what brought about those payments? Did you talk with Mr. Hunt about his accident, and Mr. Russell?

(Testimony of Harry G. Hadfield.)

A. What brought about the payments?

Q. Yes. How was it that you made those payments? [99]

A. Well, a claim was reported to us in June of 1934 under which there was only one payment made up until along later in the year. The first payment was made to Dr. E. W. Simmons. Then——" (Interruption)

"Q. Then when did you talk with Mr. Hunt and Mr. Russell in your office? Did they come over there or not? A. Yes.

Q. And you talked with Mr. Hunt at that time? A. Yes, sir.

Q. And did Mr.—what did Mr. Hunt tell you, if anything, about the occurrence there on November 5th, 1934?

A. Mr. Hunt explained that he had had a recurrence of an injury that he had had in June, I think it was June the 11th, 1934.

Q. What, if anything was said about an operation?

A. He said they had talked to Dr. Dillehunt and he had recommended a fusion operation.

Q. What kind of an operation?

A. Fusion. I think that was pronounced right.

Q. And what, if any, arrangements were made then with respect to compensation?

(Testimony of Harry G. Hadfield.)

A. There had been some time elapse from the injury of June the 11th, and there was a little question as to whether or not we would take care of those payments, and for that reason Mr. Russell had telephoned me. He said they would like to come over and talk to me about it. They came over, and——" (Interruption)

A. Mr. Hunt and Mr. Russell came over to the office and said that Dr. Dillehunt had recommended this fusion operation, and I didn't know what it was myself. I hadn't had any experience with it before, and so I asked him just what the operation meant. He informed me of what they would have to do to the joints there, and so I asked him at that time how that happened. He stated that he had sprained his back as the result of changing a tire, and I told him we had had a report of an accident in June of the same thing and he said yes, it was a recurrence of the first injury.

Mr. Powers: Q. And did he tell you that any car had fallen on him at any time?

A. No, sir.

Q. And what was said with respect, now, to getting you to pay him compensation payments and take care of the doctor bills and hospital bills?

(Testimony of Harry G. Hadfield.)

A. They asked me if that would be taken care of by the Hartford. I told them that if Dr. Dillehunt had recommended [100]

(T. P. 173, Line 16, to P. 176, Line 7.)

Mr. Rauch: I object to that, our Honor. There is only one policy in evidence. They produced it, and they certainly must certify as to the truth of that exhibit. One policy only has been offered, and it seems to me it is entirely outside of the issues and also particularly outside of anything that has been framed.

Mr. Powers: Q. Do you have the original policies with you?

A. I have two of them here.

The Court: Do you mean you are taken by surprise, Mr. Rauch?

Mr. Rauch: Why certainly, your Honor. They have laid their claim——

The Court: We will take the morning recess, gentlemen.

(The jury was excused, and the matter was argued pro and con without the presence of the jury by respective counsel; at the conclusion of the argument, the Court, in the absence of the jury, ruled as follows:)

The Court: Well, now I will tell you, Mr. Rauch. I am not going to pin myself down to

the particular dates that are written on these drafts, and I would be willing to sit here and listen to you for a long while gladly if I really thought that you were surprised by this and that your case was affected by it, but I don't see that, and it may be necessary to amend the pre-trial order, I am not sure of that. I will look up the rule pretty soon, but if we were just trying this case, Mr. Rauch, without the pre-trial in the old fashioned way, and a man came in here with two policies instead of one, we would just treat that as a routine development on the other side, and I don't see that you have been kept from any preparation you could have made. You still have your rebuttal.

Mr. Rauch: Well, if your Honor views it that way I will withdraw my objection.

The Court: I am going to tell the jury at the end, if the case goes to the jury, unless Mr. Powers can persuade me as a matter of law that this is a release, and that is not my feeling just now, I am just going to give this to them as to whether there was a meeting of the minds on a settlement, if it goes to the jury. That is my present feeling, that the situation is part in parol and part in writing, but I shall leave it all to the jury to pass on that question. And so I will admit that policy.

(The policies of insurance so offered and received in evidence were marked De-

(Testimony of Harry G. Hadfield.)

fendant's Exhibits 26 and 27, respectively.) [101]

"Mr. Powers: Q. Do you have the original policies with you?

A. I have two of them here." (Interruption)

"Q. Mr. Hadfield, I was asking you about the drafts, and I noticed one bears the number 543012, and one bears the number of 519380, giving policy numbers. How is it that there were two different policy numbers there on the drafts?

A. Well, that would come on the expiration of one policy and another one started. These policies run for a year at a time.

Q. And one policy had expired on July—I think the policies are in evidence now. May I have those?

A. It was in July, I believe.

Q. Well, was there a policy in force at the time he went to the hospital for the Union Oil Company, the same time?

A. Yes, sir. * * *

A. One expired July 1st and one on June 30th.

Q. Now, which one expired July 1st? Who was that written for?

A. That was written for the Union Service Stations, Incorporated.

(Testimony of Harry G. Hadfield.)

Q. That expired what date, you say?

A. That expired July 1st, 1934.

Q. And when did the other one go into effect?

A. The other one would go into effect the same day.

Q. And when did it expire?

A. On June 30th, 1935.

Q. So there was a policy in force, then, both in June and in November, is that correct?

A. Yes, sir.

Q. And some of the drafts here were paid under one policy and some the other, is that correct? A. That is right.

Q. So, so far as policy coverage was concerned, it didn't make any difference whether —— (Interruption) [102] the operation, if it was a recurrence of the first injury, we had nothing to do but to take care of it.

Q. And did you go into the matter of how much compensation he would get, or anything like that?

A. Yes. They wanted to know what it covered and I informed them that we would——

Q. They wanted to know what it would cover, you say?

A. Yes. I informed them that we would have to take care of the medical and hospital

(Testimony of Harry G. Hadfield.)

bills and also pay him a percentage of his wages the same as the Industrial—State Industrial Accident Commission would pay.

Q. And was the amount of his compensation payments then on the state basis figured out?

A. Yes, sir.

Q. And was it figured out there in Hunt's presence? A. Yes, sir.

Q. And what did that figure out?

A. Well, I have a chart to go by.

A. I have a chart that the State Industrial Accident Commission pays, and it figured out fifty-three per cent.

Q. And that is the same as the State Industrial Accident Commission pays, is it?

A. Yes, sir.

Q. And did you make those payments to him then after he went to the hospital?

A. Well, we started in. I don't remember whether we paid every week or every two weeks, I have forgotten that.

Q. Now, I see that there are two different policy numbers referred to on the drafts. That is, one draft here of March the 11th, 1935, bears policy number 543012. Can you tell me which policy that——" (Interruption) [103]

(Testimony of Harry G. Hadfield.)

(T. P. 177, Line 20, to P. 179, Line 12.)

Mr. Rauch: Just a minute. May it please your Honor——

Mr. Powers: Q. ——whether the payments were made at one time or another, either in June or November, is that correct?

The Court: Don't answer.

Mr. Rauch: May I have an opportunity to examine these before he proceeds with his examination?

The Court: Yes.

Mr. Powers: Possibly I could recall this witness and Mr. Rauch could examine them at noon, because I have a man who has to go to a funeral this afternoon, and I would like to put him on out of turn if it is agreeable with Mr. Rauch.

Mr. Rauch: That is all right, if it is agreeable with the Court.

Mr. Powers: Step down, Mr. Hadfield, please.

(Witness temporarily excused.)

* * * * * * *

Mr. Powers: Recall Mr. Hadfield.

HARRY G. HADFIELD

was thereupon recalled as a witness in behalf of the defendant and, having been previously duly sworn, was examined and testified further as follows:

(Testimony of Harry G. Hadfield.)

Direct Examination (Continued)

By Mr. Powers:

Q. I think that I was just asking that question about whether—well, did both policies have the workmen's compensation endorsement on them? A. Yes, sir.

Q. And that workmen's compensation endorsement policy on each policy was the same?

Mr. Rauch: I still feel that the documents are the best evidence.

The Court: That is correct.

Mr. Rauch: I would like to have time enough to look at them before there is anything further done about the documents.

Mr. Powers: I will read these documents to the jury at this time. [104]

Mr. Rauch: I want to see them first, your Honor.

The Court: Let him see them.

Mr. Powers: They are already in evidence.

Mr. Rauch: I am going to object to their going in evidence unless I have a chance to see them.

The Court: He can see them. He wants to examine them at noon, he says.

Mr. Powers: Yes. Well——

"Q. Now, I hand you two drafts marked Defendant's Exhibits, and tell us whether they both contain the same policy number.

(Testimony of Harry G. Hadfield.)

Q. Well, I will call your attention to the fact, Mr. Hadfield, that they do contain different policy numbers on the draft. Now, can you state to the jury why that is?

A. Well, that is due to the——

Mr. Rauch: I still object, your Honor.

The Court: Now, gentlemen, maybe I am the only one here that understands about the policy business, or may be I am [105] the only one that misunderstands. You can correct me if I am wrong. I understand that this man worked for the Union Service Stations until July. He had his first injury in June while he was working for those people.

Mr. Powers: Yes, your Honor.

The Court: During that period Union Service Stations had one of these policies.

Mr. Powers: That is correct.

The Court: Which ran out at the end of June. He began to work in July for the Union Oil Company and during that employment and in November he was hurt, so he says, the second time, which aggravated his prior injury for which he is suing here now, and during that period Union Oil Company had a policy of the same kind and with the same company.

Mr. Powers: That is correct.

The Court: And you claim that these drafts were paid under both of those policies, some

(Testimony of Harry G. Hadfield.)

under one policy and some under another policy.

Mr. Powers: That is correct, your Honor.

The Court: And that is all there is to that now, isn't it?

Mr. Powers: Except that there was some reason why, when they first started paying under the second policy, the Union Oil Company policy, to show why they went back and started charging it up to the first policy again, the operation and the claim from November 5th.

(Further discussion.)

Mr. Powers: Q. Can you state to the jury why that was, whether you had any conversation with the doctor about it?

A. Yes. Dr. Dillehunt informed us that it was a recurrence of July the 11th.

Q. Was that July or June?

A. Or June the 11th, pardon me.

Mr. Rauch: I didn't quite get your answer, Mr. Hadfield.

A. I said Dr. Dillehunt informed us this November 5th injury was a recurrence of the injury of June 11th.

Mr. Powers: Q. And that was the reason two different charges were made there against the different policies? A. Yes."

(Testimony of Harry G. Hadfield.)

(T. P. 134, Line 25, to P. 135, Line 4.) (R. Hunt.)

Q. Now, at any time, whether by the signing of the check or in any manner, did you ever agree with any person to waive your right to claim for injuries to yourself, your body, your person, on account of the accident of November 5th? A. No, I didn't. [106]

(T. P. 182 Line 18 to P. 185 Line 9)

JAMES RALPH HUNT,

the plaintiff, was thereupon recalled as a witness in his own behalf and, having been previously duly sworn, was examined and testified further in rebuttal as follows:

Direct Examination

By Mr. Rauch:

Q. I wish to hand you Defendant's Exhibit 27, that is the insurance policy which Mr. Hadfield stated was the second insurance policy and which was introduced last. I will ask you when you first saw that policy.

A. Yesterday was the first time I saw it.

Q. When it was brought in here?

A. When it was brought in here.

Q. Did you ever discuss that policy with anyone? A. No, sir.

(Testimony of James Ralph Hunt.)

Q. Did you ever agree to accept anything under that policy in consideration of the settlement of your claims against the Union Oil Company? A. No, sir.

Mr. Powers: The instrument speaks for itself, if the Court please.

Mr. Rauch: If the Court please, this has been gone into as partial parol and partially writing.

Q. Now, I want to ask you, as you understood it, as far as you understood it, for what did you accept the drafts that were paid to you marked "Comp." and periods of time, for instance June 1st to June 15th, 1935?

A. I understood those drafts to be payments for the time that I had lost due to my accident and the aggravation of that first injury.

Q. Now, I am referring to the letters which I introduced which stated that you were being paid for your second accident of November 5th, 1934, and ask you if you ever received anything or any draft at any time relating to the second policy which you hold in your hand?

A. No, I didn't.

Mr. Powers: What is the number of that policy?

Mr. Rauch: Q. What is the number you hold? A. 543014. [107]

Q. Did you get something for loss of time on account of your second injury?

(Testimony of James Ralph Hunt.)

A. Yes, I did.

Q. Now, why do you say that you never received anything on account of the second injury in any way relating to or with respect to the second policy? And before you answer I am handing you Defendant's Exhibit 10 and Defendant's Exhibit 11, which are drafts that refer to the accident of November 5th, 1934, and ask you why you say you never received anything under the second insurance policy?

A. I say that because the numbers on the checks refer to different policies.

Q. That money that you received then does not refer to this second policy at all?

A. No, sir.

Q. I want to ask you if you ever in any way, orally or in writing or in any manner, agreed to accept anything in settlement, satisfaction or release under any policy for anything from the Union Oil Company or the Hartford Insurance Company? A. No, sir.

Mr. Powers: He is seeking to change a written document by parol evidence.

Mr. Rauch: Q. When you received those checks marked for the accident of November 5th, 1934, what did you understand you were receiving?

A. I understood I was receiving my time for the accident that happened to me. It was just payment or compensation for time lost.

(Testimony of James Ralph Hunt.)

Q. Lost on account of what?

A. Well, the first injury, and I saw the dates on there and I thought possibly there was a mistake, to the second accident and the aggravation of the first injury.

Q. Did you ever accept any money at any time from this defendant or its insurance company for any other claim than this compensation, for any other claim or for any other reason or thing for this compensation which you state is for time lost due to the operation, the first accident, aggravation of that, and the second accident? A. No, sir.

MR. A. M. RUSSELL

was called by the defendant and testified (T. 143) that he was district service manager for the [108] defendant and was the plaintiff's superior. And T. 148, 149:

"Q. Now, you talked with Mr. Hunt there about an operation and the condition of his back. Did you take it up with Mr. Hadfield?

A. Yes, sir.

Q. And did you ever talk with Mr. Hadfield about that when Mr. Hunt was there?

A. Yes, sir.

Q. And had you talked with Mr. Hadfield before Mr. Hunt got there, over the telephone or anything like that?

(Testimony of A. M. Russell.)

A. On one or two occasions, yes, I had checked by phone with Mr. Hadfield.

Q. And where did you talk with Mr. Hadfield? A. At his office.

Q. And Mr. Hunt was with you over there?

A. Yes, sir.

Q. And what occurred there? What was said at that time?

A. Arrangements were made for the payments of the operation, the hospitalization, and for compensation.

Q. Under the Hartford policy?

A. Under the Hartford's policy. That was our mission to his office.

Q. Did Mr. Hunt say anything about wanting to take those compensation payments and have the operation paid for?

A. Yes, sir, he agreed at that time.

Q. And did he state to Mr. Hadfield there in your presence, the three of you there, how the accident occurred, what it was, what he wanted to be operated on for?

A. Yes, sir, the accident was described.

Q. And what was said about that?

A. I can't give the exact wording. However, we had gone back and covered the case from the beginning, and in our discussions for compensation and all it was discussed with Mr. Hunt as to whether or not he would be acceptable to this arrangement, that he would agree to it, which he did in our presence.

(Testimony of A. M. Russell.)

Q. And was the compensation, the amount that he was to receive, was that figured out there at that time or not?

A. Yes, sir.

Q. And was that figured out the same as is paid by the State?

A. It was on the rate of the State Compensation Law." [109]

EXHIBITS

There was received in evidence, defendant's Exhibit I, which was an application made by plaintiff under date of September 14, 1936, (a year and three months after plaintiff returned to work after his operation) for an accident insurance policy in which he described his duties as "Automobile Filling Station Proprietor or attendant", and in which application the following questions and answers appear, application having been signed by the plaintiff:

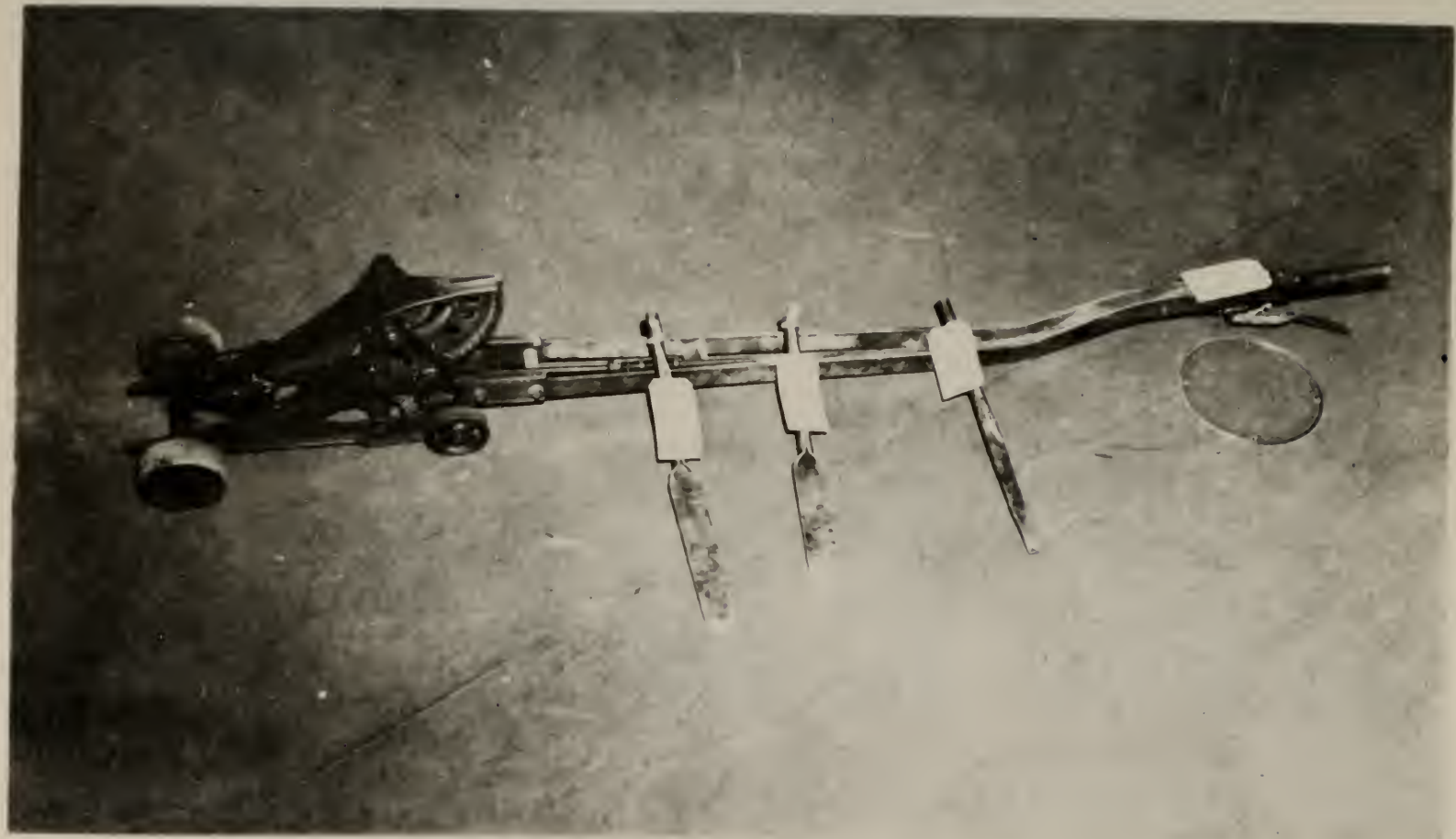
"Have you ever at any time received indemnity for accident or illness disability, except as herein stated? Yes. Un. Oil Co. Strained back—June, 1934."

"Have you received any medical or surgical attention within the past two years? (Give details) No."

"Have you ever undergone a surgical operation or has an operation been recommended, except as herein stated? (Give details) For above spinal fusion, full recovery."

DEFENDANT'S EXHIBITS 2, 3, 4 and 5 consist of photographs of the filling station where plaintiff worked and are not pertinent in this appeal.

DEFENDANT'S EXHIBITS 6, 7 and 8 consist of tire irons and a weaver jack, the jack having four small wheels on which it can be rolled, and a long handle which permits the person using the jack to shove it under a car and jack the car up without getting under it. These exhibits, particularly the jack, are difficult to describe and photograph showing the jack and the tire irons is affixed hereto.



DEFENDANT'S EXHIBITS 10, 11, 12, 14, 15, 16, 17, 18, and 19

consist of drafts issued by the Hartford Accident and Indemnity Company to Ralph Hunt, the plaintiff, all of which drafts are endorsed by the plaintiff, Ralph Hunt, and bear "Paid" stamps through several banks and trust companies. On the face and back of each draft there appears substantially the following: [110]

"No. P.C.D. 527264
(Office) Portland, Oregon

To Hartford Accident and Indemnity Company
Hartford, Conn.

San Francisco, Cal. 3/11/35

Pay to the order of Ralph Hunt———$33.34
Thirty-three & 34/100————————/100 Dollars.
Nature of Payment—Comp. 2/25-3/15 Inc. at $3.70nX 53%.
To Hartford Accident and Indemnity Co.
through Wells Fargo Bank & Union Trust Co. San Francisco, Cal.
HARRY G. HADFIELD

Particulars of Claim or Account
Claim number—
Pol. Intl.—US
Policy No.—543012
Date of Accident—11/5/34
Assured—Union Oil Company
Injured or Claimant—Ralph Hunt

The endorsement of this draft constitutes a clear release and receipt in full settlement of the above claim or account."

"The endorsement of this draft by the payee constitutes a clear release and receipt in full settlement of the claim or account stated on the other side.

Endorsements must be guaranteed.

Ink endorsement required.

RALPH HUNT
HELEN HUNT"

(And bank endorsements.)

In the first two drafts referred to above, namely Exhibits 10 and 11, the name "Union Oil Company" appears under the word "Assured", and policy number is given as 543012; date of accident in Exhibit 10 stated as November 5, 1934. Date of accident, Exhibit 11, is stated November 5, 1934, with a line drawn through that date and the date of 6/11/34 written in. The original claim number on this draft, namely 823558 has been marked out by pen and the claim number 817056 inserted. All the other drafts referred to above designate the name of the Union Service Stations as assured and gives the date of the accident as June 11, 1934, using claim number 817056 and policy number 519380. On Exhibit [111] 14 there appears to be a transposition of the policy number and claim number. All the drafts designate under the heading of "Injured or Claimant", Ralph Hunt (plaintiff). On six of the said drafts, the abbreviated word "Comp." appears

before Ralph Hunt's name. On the face of all the above drafts, there appears "Nature of Payment, Comp." The only other difference is the period stated on the face of the draft, which the particular compensation payment covered. These drafts were issued on the following dates and in the following amounts:

3/11/35	$33.34
3/30/35	25.49
April 15, 1935	25.49
May 4, 1935	25.49
May 15, 1935	25.49
June 1, 1935	27.45
June 14, 1935	25.49
7/1/35	23.53
7/11/35	23.53

EXHIBITS 9, 13 and 20

are drafts in the same form as above issued under the following dates:

July 20, 1934, to E. W. Simmons, M.D., $7.50
April 27, 1935, to Emanuel Hospital, $163.35
November 7, 1935, to R. B. Dillehunt, M.D., $414.50.

DEFENDANT'S EXHIBIT 26

is a "Standard Workmen's Compensation and Employer's liability policy" issued by Hartford Acci-

dent and Indemnity Co. to Union Service Stations, Inc., No. US519380, and in force from July 1st, 1933, to July 1st, 1934. The pertinent provisions read as follows:

> "Hartford Accident and Indemnity Company (hereinafter called the company) Does Hereby Agree with this employer, named and described as such in the Declarations forming a part hereof, as respects personal injuries sustained by employees, including death at any time resulting therefrom, as follows:
> Compensation
>
> One. (a) To pay promptly to any person entitled thereto under the Workmen's Compensation Law and in the manner therein provided, the entire amount of any sum due, and all installments thereof as they become due,
>
> (1) To such person because of the obligation for compensation for any such injury imposed upon or [112] accepted by this employer under such of certain statutes as may be applicable thereto, cited and described in an endorsement attached to this policy, each of which statutes is herein referred to as the Workmen's Compensation Law, and
>
> (2) For the benefit of such person the proper cost of whatever medical, surgical, nurse, or hospital services, medical or surgical apparatus or appliances and medicines, or, in the event of fatal injury, whatever funeral ex-

penses are required by the provisions of such Workmen's Compensation Law.

It is agreed that all the provisions of each Workmen's Compensation Law covered hereby shall be and remain a part of this contract as fully and completely as if written herein, so far as they apply to compensation or other benefits for any personal injury or death covered by this policy, while this policy shall remain in force. Nothing herein contained shall operate to so extend this policy as to include within its terms any Workmen's Compensation Law, scheme or plan not cited in an endorsement hereto attached. * * *

"D. The obligations of Paragraph One (a) foregoing are hereby declared to be the direct obligations and promises of the company to any injured employee covered hereby, or, in the event of his death, to dependents; and to each such employee or such dependent the company is hereby made directly and primarily liable under said obligations and promises. This contract is made for the benefit of such employees or such dependents and is enforceable against the company, by any such employee or such dependent in his name or on his behalf, at any time and in any manner permitted by law, whether claims or proceedings are brought against the company alone or jointly with this employer. * * *

Attached to said insurance policy is a rider designated "Oregon Compensation Endorsement" containing provisions deemed pertinent here as follows:

> "The obligations of Paragraph One (a) of the Policy to which this endorsement is attached, as hereinafter amended, include such Workmen's Compensation Laws as are herein cited and described and none other:
>
> "Sections 6605 to 6659 inclusive, of Title XXXVII, Olson's General Laws of Oregon (1920), as amended by Chapter 311, Laws of 1921, and Chapter 256, Laws of 1923, State of Oregon, and all laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force.
>
> "Upon acceptance and delivery of this policy it is agreed that this employer is not subject to the provisions of the above cited Workmen's Compensation Law and will not subject himself thereto while this policy is in force.
>
> "Paragraph one (a) of the policy is amended to read as follows as respects business operations in Oregon: [113]
>
> "One (a) To Pay Promptly and voluntarily to any person who would have been entitled thereto if this employer was subject to such law, and in full compliance with the provisions of such law in the manner therein provided, the entire amount of any sum payable and all installments thereof as they become payable.

(1) To such person the compensation provided by such law for any such injury;

(2) For the benefit of such person the proper cost of whatever medical, surgical, nurse or hospital services, medical or surgical apparatus or appliances and medicines, or, in the event of fatal injury, whatever funeral expenses are included in the provisions of such Workman's Compensation Law.

"It is agreed that all of the provisions of such Workmen's Compensation Law shall be and remain a part of this contract as fully and completely as if written herein as a measure of the compensation or other benefits for any personal injury or death covered by this policy while this policy shall remain in force. Nothing herein contained shall include within the provisions of this amendment any Workmen's pensation Law, scheme, or plan other than as above cited.

"This is a contract between the Company and this employer for the benefit of any employee covered by this policy who receives an injury for which he would be entitled to compensation under the provisions of such law if this employer was subject thereto. It is the purpose hereof to provide voluntarily such compensation to such injured employees as will accept it in lieu of all other claims or demands because of such injury. In the event of such

injury the Company will offer to pay to the injured, or to his dependents if the injury results in death, all the benefits provided by such Workmen's Compensation Law, payable in the manner therein provided. If the injured employee refuses or neglects to accept the payment so offered or make an agreement respecting subsequent payments whether offered in the form of a legal tender or not, such refusal or neglect shall be considered as a rejection of the voluntary undertakings herein set forth, and thereafter such voluntary undertakings shall be withdrawn. Thereupon the Company will remain obligated to this Employer as respects such injured employee only in accordance with the undertakings of Paragraph One (b) of the policy and the other undertakings of the policy related thereto. The earned premium under this policy shall not be affected by any such rejection on the part of any injured employee or his dependents.

"If such injured employee or his dependents accept the first payment on account of compensation, he or they shall at that time execute a general release relieving this Employer and the Company from all further obligation because of such injury except the obligation for compensation in manner and form as agreed. The Company shall continue the payment of the installments of compensation as the law provides until such time as disability shall cease or

other conditions shall arise which according to the provisions of such law would operate to terminate the compensation payments. [114]

"If compensation payments are to be terminated for the reason that disability has ceased, and the injured employee and the Company cannot agree with respect to the date upon which such payments shall terminate, then the question shall be submitted to medical arbitration. The Company and the beneficiary shall each appoint one competent duly licensed physician and surgeon, and if these two are unable to agree, these arbitrators shall call in a third competent and duly licensed physician and surgeon. * * * The findings of two of the medical arbitrators shall be final as respects the termination of disability. The beneficiary and the Company shall each pay his or its physician and surgeon and shall divide equally the expense of the third physician and surgeon if called.

"The premium rates stated in the policy are the full premium requirements for the hazards undertaken by the Company, and the Company will not claim or demand any contribution by the employees of this Employer who are covered by this policy either in accordance with the provisions of such law or in any other way. All provisions in this policy respecting premium or the method of computing or adjusting the

same are direct contracts between this employer and the Company and without effect upon the employees covered hereby."

DEFENDANT'S EXHIBIT 27

consists of a renewal policy of insurance identical in form as defendant's Exhibit 26, issued by the same insurance Company to Union Oil Company, its allied and subsidiary companies, as employer, Policy No. 543014, covering period from June 30, 1934, to June 30, 1935.

DEFENDANT'S EXHIBIT 33

consists of a surgeon's report to the Hartford Accident and Indemnity Company by Dr. R. B. Dillehunt under date of May 17, 1935, reading as follows:

"Important—This report is necessary in relation to compensation to be paid.

1. Name of employer—Union Oil Co.
2. Name of person injured—Ralph Hunt
3. Date of injury—June 12, 1934
4. Is patient able to work?—No
5. When in your opinion will he be able to work?—About July 15, 1935
6. Please state present condition of injured and treatment.—Lumbo Sacral fusion operation March 1, 1935, for chronic lumbro-sacral lesion.

Now in brace. Up and about. No pain. About June 15th will remove brace and start gentle movement." [115]

And a similar report dated July 10, 1935, reads as follows:

"1. Name of employer—Union Oil Co.

2. Name of person injured—Ralph Hunt

3. Date of injury—June 22, 1934

4. Is patient able to work?—Yes

5. When in your opinion will he be able to work?—June 24, 1935.

6. Please state present condition of injured and treatment.—Recovered."

And surgeon's final report and bill for operation on plaintiff for lumbosacral strain and lumbosacral fusion, which states that the plaintiff entered the hospital Feb. 28, 1935; discharged from hospital April 20, 1935; able to return to work June 24, 1935; total $414.00.

DEFENDANT'S EXHIBIT 35

consists of a certificate from the Corporation Commissioner of the State of Oregon showing that the Union Service Station, Inc., had withdrawn from doing business in the State of Oregon, that said corporation had been dissolved and its assets and properties taken over by the Union Oil Company and its liabilities assumed by the Union Oil Company.

PLAINTIFF'S EXHIBITS 22 and 23

consist of transmittal letters on Hartford Accident and Indemnity Company stationery signed by Harry G. Hadfield, Claim Adjuster, addressed to plaintiff, and refer to plaintiff's injury, November 5, 1934.

These letters written under date of March 11 and March 30, 1935, both read as follows except as to the amount being paid and the period covered by the compensation paid: [116]

> "We enclose herewith our draft #527264 in the sum of $33.34 covering compensation for the period from February 25th to March 15 inclusive; also receipts to cover, which we will ask you kindly to sign, have your signature witnessed and return to us at your early convenience.
>
> "A return envelope is provided for your use.
>
> "Yours very truly, Harry G. Hadfield, Claim Adjuster."

He received all his drafts by mail and they were transmitted under letter similar to the above exhibits.

PLAINTIFF'S EXHIBITS 41 to 55, INCLUSIVE,

consist of applications made by the plaintiff to Maccabees for disability payments, said exhibits being

on the same form and were made weekly covering a period of sixteen weeks thereafter. These are all signed by Dr. R. B. Dillehunt as surgeon, or his associate Dr. F. S. Lucas. They designate the plaintiff's condition as a lumbosacral strain and state the probable cause of sickness as "Injury—June 13-34". In some of these reports the plaintiff's condition is described as a lumbo sacral strain severe. The reports indicate that the disability payments claimed were paid by the Maccabees. These reports and exhibits do not relate to the compensation payments made by the Hartford Accident and Indemnity Company. [117]

NARRATIVE STATEMENT OF ISSUES.

Plaintiff filed his complaint under date of May 16, 1936, seeking to recover for an injury to his back, which he alleged he sustained on June 12, 1934, while working with a tire iron and for a second injury of November 5, 1934, which allegedly aggravated the prior injury. This action was brought against his employers, the Union Oil Company and the Union Service Stations, Inc. It was alleged the defendants ordered the plaintiff to resume his work after his first injury and while he was in a debilitated condition and physically unable to do so and as a result thereof an accident occurred on November 5, 1934, while he was engaged in operating an automobile jack under a car, which resulted in an aggravation of his prior injury.

Several motions were made and amended complaints filed. Finally the second amended complaint was filed and several of the early allegations were dropped from the complaint, and counsel for plaintiff stated in open court that he was going to rely on the alleged accident and injuries sustained November 5, 1934, and on aggravation of injury as far as the accident of June 12, 1934, is concerned. Thus there was dropped from the complaint any claim to recover for the original accident of June 12th and any right to recover on the theory of the defendant's having required the plaintiff to work when he was physically unable to do so. It was alleged in the original complaint filed that the Union Oil Company had rejected the State Compensation Act as of July 1, 1934. The case proceeded to trial against both the defendants, namely: The Union Oil Company and Union Service Stations, Inc., and during trial upon a showing by a certificate from the Corporation Commissioner of the State of Oregon, that the defendant Union Service Stations, Inc., had dissolved and ceased to do business as of July 1, 1934, and that the Union Oil Company had assumed the assets [118] and liabilities of said Union Service Stations, Inc., the Court entered an order dismissing the Union Service Stations, Inc., from the case. The trial then proceeded against the Union Oil Company as sole defendant. There were allegations in the complaint charging the defendant with having violated the employer's liability act of

the State of Oregon and also an allegation seeking to recover punitive damages from the defendant. Upon motion of the defendant during the trial the Court ruled that the action did not fall within the terms of the employer's liability act and that there was no showing made which would entitle the defendant to punitive damages and orders were entered accordingly. The case continued as a simple common law action for negligence by an employee against his employer. At the conclusion of the case defendant made a motion for a directed verdict under the evidence in the case chiefly on the grounds that the plaintiff could not recover because he had assumed as a matter of law such risk and danger, if any there was, in doing the work he was engaged in at the time of the injury, namely, using a small Ford automobile jack, which jack belonged to the plaintiff himself and on the grounds the plaintiff had been compensated for the same injury and had agreed to take and had taken compensation payments from the defendant's insurance carrier under an employer's liability insurance policy containing a workmen's compensation endorsement which entitled him to all of the benefits of the State Workmen's Compensation Act and to receive payments thereunder in the same amounts as prescribed by the said workmen's compensation act. These matters had been alleged in defendant's answer. No reply was filed by plaintiff. Plaintiff's charge of negligence as finally simmered down was that the de-

fendant had failed to furnish him with a safe and proper jack and also had failed to furnish him with an able bodied assistant. [119] Plaintiff in his testimony admitted receiving compensation payments but took the position that he had never seen the policy of insurance under which these payments were made and that he did not understand that by accepting these payments, he would be barred from also suing his employer for his injuries. The Court denied defendant's motion for a directed verdict and submitted the case to the Jury, and after the Jury's verdict had been rendered, reconsidered the motion for a directed verdict together with a motion made by the defendant to set aside the verdict and judgment and for a new trial and on March 7, 1939, entered an order denying both of said motions rendering a memorandum opinion.

During the course of trial, defendant moved the Court for an order to take from the Jury plaintiff's claim that his action fell within the Employer's Liability Act of the State of Oregon. The Court granted defendant's motion, in this respect, making an oral order from the bench. Defendant's motion and the Court's ruling thereon made in open Court are as follows:

"DEFENDANT'S MOTION FOR NON-SUIT

"Mr. Powers: Comes now the defendant and moves the Court for a judgment of invol-

untary non-suit on the grounds and for the reasons that, first, that the plaintiff has shown no right to relief; second, that it now affirmatively appears from the evidence and testimony in the case that the plaintiff has changed his cause of action from one in tort to one in contract, and that he has received compensation payments for the same injuries which he now seeks to recover for in this action, and that he has been paid for those same injuries; that if he has a claim at all he would have a claim under the insurance policy; third, that it appears from the evidence that the question of whether the Employer's Liability Act is applicable is one of law for the Court to determine now from the evidence, inasmuch as it is shown that the plaintiff bases his claim to come under the Employer's Liability Act on the ground or upon the theory that he was not able to do the work, he was not able to lift the jack in and out of his car or he could have taken it along, he was not able to get around and do the work as an able bodied man would have done in getting under the car. The next ground is that there is no evidence in this case to be submitted to the Jury; that it appears that the Employer's Liability Act does not apply as a matter of law and that therefore the common law negligence is applicable and that no evidence here shows any negligence at all on the

defendant for any common law liability. If [120] there was anything here in the way of overexertion or an assumption of risk, that is a defense to this action under any common law theory.

(The motion was argued pro and con at length by respective counsel, following which an adjournment herein was taken until Tuesday, December 20, 1938, at 10:00 o'clock A. M., at which time Court reconvened and the Court ruled as follows:)

The Court: I don't know whether I am privileged to say I have prayerfully considered the matter, but I have carefully considered the matter which was presented yesterday, and I can only say that I don't feel at liberty to attempt to distinguish this case from the Ridley case. So the matter will proceed as a common law action from here on. The motion to dismiss will be denied.

Mr. Powers: With the usual exception allowed, your Honor?

The Court: Exception allowed."

At the conclusion of the case the Court instructed the Jury and proceedings were had in connection with the instructions as follows:

"CHARGE OF THE COURT.

"The Court: Gentlemen, the case has boiled itself down to a fairly simple issue. I believe

I can state it to you briefly. I want to take the blame myself for dragging the case out a bit longer than it should have gone, but there were some questions that were solely for my consideration, and I am sorry to say I was a bit slow in making up my mind about it.

"But now what we are dealing with is the alleged accident in November; we are dealing with that solely and alone in determining the liability of the defendant. Was there an accident of the sort the plaintiff claims occurred when he went out to change the tire in his car. He had had a prior injury to his back in June, which is not disputed, but that is not what we are trying. We are trying the alleged accident in November. The accident in June comes into the case merely as explaining how he happened to have a bad back, and what he is claiming is damages for aggravation to the back condition which first became acute back there in June.

"The plaintiff, like in all cases, has the burden of proving his charge of liability against the defendant. He must satisfy you by a preponderance of the evidence, which means the greater weight of the evidence, that the things that are necessary for him to prove have been proved.

"Now, every employer has the duty of providing reasonably safe and adequate tools for

his employees to work with, and that is the charge the plaintiff has made against the defendant in this case, that reasonably safe and adequate tools were not provided for this tire changing. Now, that is for you to [121] decide, whether the defendant's conduct did not come up to that standard of its obligation as an employer. If you are satisfied by a preponderance of the evidence that the defendant did not provide reasonably safe and adequate tools for this work and that the plaintiff was injured as he claims, and that the failure to provide these tools was the proximate cause of his injury, which means the direct cause, then the plaintiff has established his claim as against the defendant. But that does not mean that even though you are satisfied of that that the plaintiff is entitled to recover. The defendant has pleaded three defenses. It has pleaded, first, contributory negligence by the plaintiff. Even though you should feel on account of this opening statement that I have made to you that the defendant had failed in its duty, if you should further find that the plaintiff was guilty of contributory negligence which proximately contributed to this injury, the plaintiff could not recover.

"Now, negligence in the law is that conduct of the sort which is either the doing of a thing which the average reasonable man or the ordi-

narily prudent man, as we put it sometimes, would not do under the same circumstances, or the failure to do what the average reasonable man would do. And so you must test the plaintiff's own conduct by those standards. If his own conduct under the circumstances was not that of the average reasonable man and that contributed proximately to the accident, he could not recover.

"Just as the plaintiff has the burden of proving the defendant's failure to come up to the standard the law imposes on it, so in considering contributory negligence the burden of proof is on the other side. You must be satisfied as to that by a preponderance of the evidence offered in the defendant's behalf in that respect.

"Now, passing that, the defendant has pleaded another defense, as it is allowed to by law in cases of this kind, called assumption of risk. Ordinarily that is stated this way, that an employee assumes those risks of his employment that he knows and appreciates, and so in this case. As to that I may say the defendant also has the burden of proof, and if you should feel that the defendant has satisfied the burden of proof as to that and that this risk which went with the use of this jack and changing the tire in this particular way was a danger or risk of the kind that the plaintiff knew and that he

appreciated and understood, he would not be entitled to recover.

"The third defense that the defendant has pleaded and that you have heard a good deal about is that he has been paid for his accident and his injury and that he has given a release and that this is in discharge of all obligation the defendant might have ever had to him or that anybody might have ever had to him on account of the alleged injury. Now, you have here some checks and you have some insurance contracts and there has been testimony from the witness stand supplementing that on both sides, and I leave all of that to you gentlemen of the jury to determine as a question of fact. As to that the defendant has also the burden of proof, and the question for you to decide is whether the plaintiff considered and understood these payments that were made to him as in complete release and discharge of all obligations and all liability growing out of the accident from the [122] defendant or from the insurance company. By that I mean obligation on anybody's part. The plaintiff's theory is that he felt he was just being paid for the loss of his time. The defendant's theory is that——I am sure I can't state it as well as Mr. Powers has stated it for his client, but in brief that they have paid this plaintiff all that he would have gotten under the Workmen's Com-

pensation Law of Oregon had this company under this Act, which it happened not to be, and that the plaintiff knew that this company had that sort of an arrangement with the insurance company and that before he accepted the medical services and surgical care and the sums that were paid him thereafter, that they had an understanding with him that was in full payment and discharge of all claims against them. If that should be your conclusion under all of the evidence, the plaintiff cannot recover. On the other hand, if your feeling should be that the plaintiff did not understand it that way and that he felt these payments were just for his loss of time and not for these other elements for which he is now suing, then that would not be a defense.

"Now, should you feel that the plaintiff is entitled to recover, he would be entitled to reasonable compensation for his pain and suffering and, in general, such amount as would compensate him for his injury, what has gone before in the way of pain and suffering and for any permanent consequences, should you find that his injury is of a permanent nature, pain and suffering in the future or impaired earning capacity, but in dealing with that question, if you do proceed that far in your deliberations, you must not be controlled by passion or prejudice, but just deal with the cold facts of the

situation. And in any comment that I have made about the amount that he would be entitled to recover, should you find for him, you are not to understand that I am expressing any view as to defendant's liability or that plaintiff is entitled to recover from the defendant.

"You are the sole and exclusive judges of the credibility of the witnesses and of the weight and value of their testimony. A witness wilfully false in one part of his testimony is to be distrusted in other respects.

"In this court a unanimous verdict is necessary. When you retire you will elect a foreman, who will sign the verdict for you. You will be given two forms of verdict, one a verdict for the defendant, should you find for the defendant, and one a verdict for the plaintiff with the amount of the damages to be filled in, should you find for the plaintiff. You will take with you to the jury room the exhibits, and give them full consideration along with the testimony that you have heard from the witness stand.

"Now I will ask you gentlemen to just remain in your seats a few minutes while I join the attorneys in my chambers, and the reporter.

"(The Court, counsel and the court reporter thereupon repaired to the Court's

Chambers, where the following occurred without the presence of the jury:)

"The Court: Now if you will speak up first, Mr. Rauch.

"Mr. Rauch: We have no objections. [123]

"Mr. Powers: I will object to the Court's instruction with respect to the insurance policies, leaving to the jury the question of what the contract and the other documents are, to construe the agreement. My position is that it is for the Court to construe the written documents.

"On the question of damages, as I understood it there in instructing on the damages, I want to except to the instruction on damages as given for the reason that it did not refer to the first accident, and tell the jury that he could not recover anything for that first accident, my theory being, of course, that it was a continuing accident and there could be no recovery for any condition that he had prior to November 5th, when he says he had the second accident.

"I also take an exception to the Court's failure to give an instruction that nothing could be allowed in this case under the insurance policies themselves, which are in evidence solely for the purpose of being submitted to the jury under the instructions given to them by the Court in determining whether justice had been made.

"And with respect to those insurance policies, I except to the Court's failure to give defendants' requested instruction that the contract or settlement leading up to the release included only the payments that have been made to date, because one of the considerations for the release is that all compensation payments will be made under that insurance policy and the insurance policy so provides, and it provides for additional compensation under the policies if there is any partial permanent disability, but before any award can be made in that regard there must be a medical arbitration.

"And I think that we should have an instruction in this case along the lines requested in defendant's requested instructions that a man is only entitled to be compensated for his injuries only once; he isn't entitled to a double compensation for the same injuries. Now, I don't know what to say about the payments that have been made in the case. It appears that there has been paid to the plaintiff and for his benefit something in the neighborhood of——I haven't the complaint here, but over $750.00, seven hundred and fifty or some such amount, and the evidence shows that that was paid after the alleged second injury. It seems to me the jury ought to be instructed in that regard some way. I haven't requested one, so—my theory there, of course, is that without a tender back

into Court for the mistake, or, if there was a mistake, if he didn't understand it that is a mistake of a fact, and he has to come in and specify that and plead it affirmatively and tender the money back into court, and that he has not done.

Mr. Rauch: I have just one suggestion——are you through, Mr. Powers?

"Mr. Powers: Yes, that is all of mine.

"Mr. Rauch: I think it would perhaps be wise to make a statement to the jury that the claim for punitive damages has been withdrawn. [124]

"The Court: Of course, they won't see the pleadings.

"Mr. Rauch: I see. Then it ought not—the verdict does not specify anything about it, so that it is perhaps——

"The Court: There is no need to put the idea in their minds, I don't think. Thank you gentlemen very much.

"(Thereupon, the Court, counsel and the court reporter returned into the courtroom, where the following occurred within the presence of the jury:)

"The Court: I intended to make it plain to you gentlemen, but if not I will restate it, that even though you should find for the plaintiff no claim can be made for the first accident in June. We are dealing solely with the acci-

dent in November, and the damages, if any, allowed to the plaintiff can only be for damages that occurred from that second accident by way of aggravation of his then existing condition, such as you might find it to be. Also, this is not in any sense a suit on the insurance policies or any of them that have been referred to here. This is what we call a tort action. It is an action for negligence, and it is based entirely on the theory of failure on the part of the employer to provide reasonably safe and adequate tools.

"I don't want to confuse you about the insurance feature of the case. It is defendant's theory that plaintiff is entitled to recover only under the insurance policies; that he made himself a party to the policies by accepting those payments and giving the releases, and that he still has some further claim, possibly might still have some further claim under the policies if he accepted that in lieu of it and made himself a party to the policies. In short, that even though he still had some permanent partial disability, that he would have claims under the policies in the way provided by the policies, that is, arbitration by medical men as to whether he did have further injury and the extent of it. But, as I said to you before, the plaintiff wholly rejects that theory that he ever made himself a party to the insurance policies and bases his claim on the alleged negligence through failure

to provide safe and adequate tools, so he claims; not claiming, however, any damages for the loss of time, because he treats the sums that were paid him as payments for that.

"In general as to damages, the plaintiff in this kind of a case can only be paid, if damages are allowed him, for his actual damages, whatever the extent his hurts have really in fact damaged him either in the past or as that damage may continue in the future. That is all for you to consider and pass on, not to exceed the maximum sum of $35,000.00 which is asked for in the complaint.

"Will you swear the bailiffs.

"(Thereupon, the bailiffs were sworn.)

"The Court: Mr. Powers and Mr. Rauch, will you come here a minute, please?

"(The Court, Mr. Powers and Mr. Rauch, here conferred privately.) [125]

"The Court: Gentlemen of the jury, only the Union Oil Company remains as the defendant in the case, and the lawyers at my suggestion have just scratched out the other company which in the beginning was joined as a defendant.

"Now you may retire, and thank you all.

"(Thereupon, at 4:35 o'clock P. M., the jury retired to consider of their verdict, and the following occurred without the presence of the jury:)

"The Court: Mr. Powers, you and Mr. Rauch are entitled to further objections, I take it, to what I have just told the jury since we came in, if you have such objections.

"Mr. Powers: No further objections or exceptions on my part, your Honor.

"Mr. Rauch: No further objections, your Honor.

"The Court: Gentlemen, will a sealed verdict be acceptable?

"Mr. Rauch: Yes, your Honor.

"Mr. Powers: It will be, your Honor."

APPELLANT'S DESIGNATION OF POINTS ON APPEAL.

1. Plaintiff as a matter of law assumed the risk and danger of being injured. Plaintiff's injury came about while he was using his own ordinary automobile jack and any risk and danger in so doing was incidental to his employment and was fully appreciated by the plaintiff.

2. Plaintiff having been injured while using an ordinary simple tool, the Court erred in instructing the Jury that defendant had duty of furnishing the plaintiff with safe and adequate tools for tire changing.

3. Plaintiff not having raised any issue of mistake or fraud, Court should have ruled as a matter of law that plaintiff in accepting compensation for the same injury, reached an accord and satisfaction with his employer's insurance carrier, and, having

been paid compensation therefor by said insurance company, plaintiff released his claim for tort against his employer and changed his original cause of action from one in tort to one of contract, [126] and that plaintiff, by his actions and in accepting compensation payments and other benefits from his employer's insurance carrier, made an election to take compensation payments under the workmen's compensation endorsement contained in his employer's policy and could not receive and retain the fruits and benefits of this contract and still maintain an action against his employer for the same injury for which he was paid. Under the law an injured person is not allowed to split his demands and causes of action and is not entitled to double compensation for same injury.

4. In failing to hold that the endorsement on the back of the compensation drafts constituted a release for plaintiff's alleged injury.

5. The Court should have construed the written documents and the legal effect thereof and instructed the Jury accordingly rather than to submit the written documents, namely, the insurance policies and drafts to the Jury to construe the legal rights of the respective parties thereunder.

6. Assuming it was proper to submit issue to Jury, Court should have instructed Jury to reduce pro tanto from any recovery the amount already received by plaintiff by way of compensation payments and payments made for his benefit for medical expense.

7. In failing to instruct the Jury that a man is only entitled to be compensated for his injuries once and is not entitled to double compensation for the same injuries.

In compliance with Rule 75 of the Rules of Civil Procedure there has been placed and filed with the Clerk of the District Court, the original and one copy of the Court Reporter's transcribed evidence taken during the trial, which contains all evidence of witnesses deemed pertinent by the appellant to the points raised on appeal. Also there has been placed and filed [127] with said Clerk two copies of the instructions of the Court and proceedings had in connection therewith and defendant's motion for non-suit and the Court's ruling thereon, all of which have been certified to by the Court Reporter.

JAMES ARTHUR POWERS
Attorney for Defendant Appellant [128]

Dated this 22nd Day of August, 1939.
Portland, Oregon.

It is understood and agreed by and between the parties hereunto, appellant, by and through its attorney, James Arthur Powers, and appellee, by and through his attorney, George L. Rauch, that the Condensed Narrative Statement of Material Evidence; Material Portions of Exhibits; Issues Raised During Trial; and Points Designated on Appeal to which this stipulation is attached, constitutes a narrative

statement which together with those portions of the evidence which is contained therein in question and answer form, constitutes and contains all that portion of the transcript of evidence and other proceedings had during trial upon which either and both of the parties hereunto will rely upon this repeal.

UNION OIL COMPANY OF CALIFORNIA, a corporation, appellant,

By JAMES ARTHUR POWERS
Attorney

JAMES RALPH HUNT,
appellee,

By GEO. L. RAUCH
Attorney

[Endorsed]: Filed August 22, 1939. [129]

CLERK'S CERTIFICATES.

United States of America,
District of Oregon.—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 129 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered L-12711, in which James Ralph Hunt is plaintiff and appellee, and Union Oil Company of California is defendant and

appellant; that said transcript has been prepared in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appear of record and on file at my office and in my custody.

I further certify that the cost of comparing and certifying the within transcript is $24.00 and that the same has been paid by said appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 23d day of August, 1939.

[Seal] G. H. MARSH,
Clerk [130]

[Endorsed]: No. 9277. United States Circuit Court of Appeals for the Ninth Circuit. Union Oil Company of California, a corporation, Appellant, vs. James Ralph Hunt, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the District of Oregon.

Filed August 28, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 9277.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Appellant,

vs.

JAMES RALPH HUNT,

Appellee.

CONCISE STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF THE PARTS OF THE RECORD WHICH APPELLANT THINKS NECESSARY TO BE PRINTED FOR THE CONSIDERATION OF THIS APPEAL.

APPELLANT'S DESIGNATION OF POINTS ON WHICH IT INTENDS TO RELY ON APPEAL.

1. Plaintiff as a matter of law assumed the risk and danger of being injured. Plaintiff's injury came about while he was using his own ordinary automobile jack and any risk and danger in so doing was incidental to his employment and was fully appreciated by the plaintiff.

2. Plaintiff having been injured while using an ordinary simple tool, the Court erred in instructing the Jury that defendant had duty of furnishing

the plaintiff with safe and adequate tools for tire changing.

3. Plaintiff not having raised any issue of mistake or fraud, Court should have ruled as a matter of law that plaintiff in accepting compensation for the same injury, reached an accord and satisfaction with his employer's insurance carrier, and, having been paid compensation therefor by said insurance company, plaintiff released his claim for tort against his employer and changed his original cause of action from one in tort to one of contract, and that plaintiff, by his actions and in accepting compensation payments and other benefits from his employer's insurance carrier, made an election to take compensation payments under the workmen's compensation endorsement contained in his employer's policy and could not receive and retain the fruits and benefits of this contract and still maintain an action against his employer for the same injury for which he was paid. Under the law an injured person is not allowed to split his demands and causes of action and is not entitled to double compensation for same injury.

4. In failing to hold that the endorsement on the back of the compensation drafts constituted a release for plaintiff's alleged injury.

5. The Court should have construed the written documents and the legal effect thereof and instructed the Jury accordingly rather than to submit the written documents, namely, the insurance policies

and drafts to the Jury to construe the legal rights of the respective parties thereunder.

6. Assuming it was proper to submit issue to Jury, Court should have instructed Jury to reduce pro tanto from any recovery the amount already received by plaintiff by way of compensation payments and payments made for his benefit for medical expense.

7. In failing to instruct the Jury that a man is only entitled to be compensated for his injuries once and is not entitled to double compensation for the same injuries.

DESIGNATION OF THE PARTS OF THE RECORD WHICH APPELLANT THINKS NECESSARY TO BE PRINTED FOR THE CONSIDERATION OF THIS APPEAL.

All of the record as prepared by the Clerk of the District Court and docketed in this Court in connection with the appeal herein, which record consists of one hundred twenty-nine pages in all, except pages contained therein of 55 to 66 inclusive, and except pages beginning in the middle of Page 68 with the testimony of Ernest H. Coats to Page 77 inclusive, omitting unnecessary titles.

JAMES ARTHUR POWERS
Attorney for Appellant.

P. O. Address:
James Arthur Powers
Attorney at Law
610 American Bank Building
Portland, Oregon

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, on this 24th day of August, 1939.

GEO. L. RAUCH
Attorney for Appellee.

[Endorsed]: Filed Aug. 28, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

WRITTEN DESIGNATION OF ADDITIONAL PARTS OF RECORD WHICH APPELLEE THINKS MATERIAL AND DESIGNATES TO BE PRINTED.

Comes now James Ralph Hunt, Appellee, herein and designates all of the record as prepared by the Clerk of the District Court and docketed in the above entitled court in the matter of the appeal herein as material and necessary for the preparation of his defense; Appellee specifically designates all those parts of the record herein which have been excepted and omitted by appellant in its designation as those additional parts of the record which Appellee thinks material and requests the Clerk of the Honorable Circuit Court herein to print the same, that is, to print the entire record, including those portions omitted in appellant's designation,

to-wit: Pages 55 to 65 inclusive and all of pages 66 to 77 inclusive.

GEO. L. RAUCH
Attorney for Appellee.

[Endorsed]: Filed Aug. 28, 1939. Paul P. O'Brien, Clerk.